Supreme Court, U.S.
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No. 05-

In The

Supreme Court of the United States

ALFRED L. BOCHESE,

Petitioner,

vs.

TOWN OF PONCE INLET, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Before Petitioner entered into a contract to sell his property to a developer he had a right to build to seventy-feet in height in his existing zoning classification. A developer entered into a contract to purchase the property with the Petitioner so as to build to a seventy-foot condominium on it. The developer then entered into a contract with the Town to rezone the property into the same zoning classification of its adjacent development. The Town rezoned it. Thereafter the Town decided that the contract with the developer was invalid so it rescinded the contract and returned the Petitioner's property to its original zoning. *After* the second rezoning, Petitioner no longer had the right to build to seventy feet. The Eleventh Circuit ruled that because Petitioner was not a party to the contract between the Town and developer he had no standing even though his property was greatly diminished in value by the rezoning. To achieve this extraordinary result, the Eleventh Circuit declared a large exception to standing under *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) and Florida law, pitted *Euclid* against *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), eliminated Rules 10(c) 15(b), and raised issues *sua sponte* in a manner that is either in conflict with the other circuits and this Court or went so far outside the boundaries of the usual course of judicial proceedings to offend due process. The questions raised by this opinion are framed as follows:

QUESTION 1. Does an affected landowner lack standing to challenge the validity of a comprehensive zoning change to his property as an unreasonable and arbitrary exercise of legislative power because the landowner was not a third party beneficiary to a development agreement with a governmental entity that previously established the zoning classification of his property?

QUESTIONS PRESENTED – Continued

QUESTION 2. Does the "well-pleaded complaint" rule allow an appellate court in de novo review of summary judgment of a civil rights claim to ignore exhibits attached to the complaint and issues tried by express consent?

QUESTION 3. Is the due process clause of the Fourteenth Amendment of the United States Constitution violated when litigants are not provided the opportunity to present legal arguments to subject matter jurisdiction challenges raised *sua sponte* by the court of appeals wherein those excluded legal arguments would have altered the court of appeals *sua sponte* determination as to its own jurisdiction?

LIST OF PARTIES

The parties below are listed in the caption.

ALFRED L. BOCHESE,

Petitioner

TOWN OF PONCE INLET, FLORIDA,

Respondent

CORPORATE DISCLOSURE

NOT APPLICABLE

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OPINION BELOW

The opinion for the Eleventh Circuit Court of Appeals is reported at *Bochese v. Town of Ponce Inlet*, 405 F.3d 964 (11th Cir. 2005). The Eleventh Circuit on April 7, 2005 affirmed in part the unpublished opinion of the district court entered on March 24, 2004.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Eleventh Circuit's opinion was rendered on April 7, 2005.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution
The First Amendment
Article III of the Constitution
42 U.S.C. § 1983
Federal Rules of Civil Procedure 10(c)
Federal Rules of Civil Procedure 15(b)
Florida Statutes 163.3194
Florida Statutes 166.041(3)(c)

STATEMENT OF THE CASE

The Petitioner Alfred Bochese asserts in this case that the Town of Ponce Inlet through improper pre-textual,

arbitrary and unreasonable legislation, down-zoned his oceanfront property and in addition, adopted and placed an arbitrary and unreasonable thirty-five foot building height restriction on the use of his property causing a diminution in its value.[1] Petitioner alleges that through this arbitrary and irrational legislative action, the Town of Ponce Inlet intentionally singled him out compared to the similarly situated property owners in the same zoning classifications in violation of the equal protection clause. The Petitioner also maintains that this unlawful action was taken in retaliation for his whistle-blowing activities related to exposing false statements made to FEMA by Town officials.

In 1990, Petitioner purchased oceanfront land in the Town of Ponce Inlet, Florida. Before purchasing the oceanfront property, the Petitioner determined that the exiting T1 zoning classification of the property permitted seventy-foot building height pursuant to Ordinance 84-11.[2]

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[1] The Petitioner also claimed the impairment/unlawful destruction of his contract with the developer and the attendant damages. He now has the property under contract for sale so that the contract issue is largely moot. The Petitioner continues to maintain that his property was far more valuable with the seventy-foot height use and that his current contemplated sale is significantly lower due to the destruction of its development value.

[2] In 1983 the Town, pursuant to Ordinance 83-012, placed a building height referendum on the ballot to amend its Town Charter restricting future buildings to thirty-five feet. The Town voters passed the building height restriction and the Charter was amended. However, in 1984, after concerns over possible litigation with ocean front property owners located in the T1 and PUD zoning classifications over the propriety of the new charter building height restrictions, the Town adopted Ordinance 84-11 which clarified the intended scope of the Ordinance referendum and grand-fathered in properties, including Petitioner's, located in the T1 and PUD zoning classifications with a

(Continued on following page)

The Petitioner initially constructed a one story single family dwelling on the property for his own use with the intention of one day having his property developed as seventy-foot tall condominium project.

On April 17, 2001, the Town of Ponce Inlet adopted Resolution 2001-08 repealing Ordinance 84-11 and thereby eliminated the seventy-foot building height exception to the Town Charter's thirty-five foot building height restriction however, the Petitioner's property was, according to the Town, still grand fathered in as to the permissible seventy-foot building height use.

The following month on May 18th 2001, the developer of the neighboring PUD classification, with the consent of Petitioner, obtained a rezoning of the Petitioner's property to PUD classification by amending its development agreement with the Town. The zoning classification provided for a seventy-foot building height for the Petitioner's property as well as three other T1 properties rezoned to PUD and flexible set back requirements. Petitioner entered into a purchase agreement with the developer for the sale of his property.

Subsequently in June and July of 2004, both the Petitioner and the project manager for the developer made public complaints about unlawful conduct engaged in by the Town Attorney. The developer's project manager complained directly to the Town Council members. The Petitioner complained publicly at Town meetings that the Town Attorney made false statements to FEMA, fraudulently holding

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seventy-foot permissible building height that were in those zoning classifications as of 1983.

the Town out as being fully compliant with the National Flood Insurance Program.

The Petitioner discovered that the Town Attorney was a director, shareholder in a corporation that owned a waterfront restaurant in Town which was one of the properties in Town in violation of the base flood elevation requirements. Petitioner and the Town were well aware of the consequences in making false statements to FEMA in that previous Town officials were charged with felonies, FEMA had previously canceled its flood insurance subsidy discounts, threatened to place the Town on probation and subsequently suspended the Town from NFIP because of its non-compliance which would have prevented its residents from purchasing flood insurance and caused the cancellation of all federally backed mortgages in town, and foreclosed the possibility of the Town obtaining disaster relief.

Almost immediately after the complaints made by Petitioner in early July of 2001, the Town began to take steps to frustrate the development of the Petitioner's property. On February 27, 2002, the Town held a special meeting and without notice, down-zoned the Petitioner's property to a T1 zoning classification providing various pre-textual reasons that ultimately included the Town Charter's thirty-five foot height limitation.

The Town instituted a declaratory action in state court and asserted that the Ordinance 84-11 exception to Town Charter building height restriction was invalid and that the rescission of the fourth amended development agreement was proper. The Town named the developer and the Petitioner as parties. However, in the early stages of the litigation, the Town voluntarily dismissed the Petitioner from the action. The state circuit court on a motion for

protective order, ruled that since the actions taken by the Town were legislative, the parties could not depose Town Council members as to motives. In light of that ruling, the Petitioner brought his claim to Federal court.

On October 23, 2002, Petitioner brought this action, pursuant to 42 U.S.C. § 1983, contending that the Town of Ponce Inlet, Florida deprived him of his rights guaranteed by the First, Fourth and Fourteenth Amendments and Article I Section 10 of the United States Constitution. Petitioner alleged that the Town through legislative action down zoning his property from PUD to T1 unreasonably impaired existing obligations under his contract with his developer, arbitrarily and irrationally impaired his property interests with out sufficient notice and a meaningful opportunity to be heard in violation of both substantive and procedural due process, unreasonably impaired his possessory interests under the Fourth Amendment, violated his rights under the equal protection clause, and furthermore did so in retaliation for the exercise of free speech criticizing the Town Attorney's conduct.

In April of 2003, the state circuit court entered a judgment in the declaratory action in favor of the Town. However the state court did not decide the specific issues raised by Petitioner in the parallel federal litigation of whether the Town Charter building height restrictions were adopted in violation of the procedural requirements of Florida law and whether these height restrictions violated state law since they were contrary to the Town's comprehensive plan.

On July 3, 2003, Petitioner filed his amended complaint adding supplemental state court claims for negligent retention and supervision and a Bert J. Harris

takings claim pursuant to Chapter 70 Florida Statutes to the pending civil rights claims. Attached to the amended complaint as Exhibit B was an affidavit and letter from the developer wherein pursuant to the attachment to the complaint, the Petitioner raised the down zoning of Petitioner's property and the loss of the seventy-foot permissible building height use. Attached as Exhibit C to the amended complaint was Petitioner's notice to the Town raising the Town's repeal of Ordinance 84-11 which eliminated the seventy-foot building height use as the basis for the loss in value of Petitioner's property. Exhibit C also included statutory responses dated from the Town Attorney denying the Petitioner's claim of $400,000 and recommending no change in the Town's position as to the application of the new thirty-five foot building height restriction through the repeal of Ordinance 84-11. App. 100-113.

Petitioner, by the end of discovery, learned of additional material facts and decided to move to amend his complaint once again to provide greater clarity to his claims. After taking the deposition of the developer, Petitioner discovered that the Town had initially adopted the charter amendment in violation of the procedural requirements of Fla. Stat. 166.041(3)(c) and that the repeal of Ordinance 84-11 imposing the thirty-five foot charter building height restrictions was also invalid on substantive grounds since the repeal also violated the provisions of state law based on the inconsistency with the stated goals of the Town's comprehensive plan. Florida Statutes 163.3194. App. 88-91.

The Petitioner also discovered that the Town had coerced the developer through a confidential settlement that required a payment of $500,000 in exchange for the permission to violate the Town's illegal thirty-five foot

height restriction on other property across the street from the Petitioner's property.

One final condition of the dubious arrangement required the developer to abandon any right and challenge to the right to build a seventy-foot condominium on the Petitioner's property. The Town threatened to demolish the developer's other buildings under construction that were seven stories if the developer did not agree to these terms. As a publicly traded company, the developer could not risk disclosing the sixty million dollars in threatened loss as a material event in its upcoming public filings with the SEC, so it capitulated to the Town's demands.

Accordingly, on November 3, 2003, Petitioner filed a motion to amend his previously amended complaint and attached a copy of the proposed amendment alleging most of the newly discovered facts. The same day, the Petitioner filed a motion to amend his answers to the Town's previous requests to admit based on the newly discovered facts. The Town did not file responses in opposition to the proposed amendments.

On November 4, 2003, the Town filed a motion for summary judgment contending that the repeal of Ordinance 84-11 eliminating the seventy-foot building height use was proper and that the Town Charter controlled. The Town also asserted that the down-zoning of the Petitioner's property was not based on arbitrary or retaliatory reasons.

On November 18, 2003, Petitioner responded by providing evidence of retaliation and legal arguments and evidence contending that the Town Charter provision was void *ab initio* based on the aforementioned procedural violations of state law and that the Town of Ponce Inlet

intentionally violated its own comprehensive plan and provisions of its own codes, charter and state law which require that all zoning regulations and decisions be consistent with its comprehensive plan when it down-zoned his property and placed a thirty-five foot building height restriction on it.

On December 2, 2003, the magistrate denied the Petitioner's motion to amend the complaint a second time stating in a handwritten note on the order "Bochese does not allege he cannot **prove discovered facts** at trial." App. 119-120. Also the same day the magistrate granted the Petitioner's motion to amend his answers to the Town's request to admit so that they were consistent with the newly discovered facts. App. 117-118.

On December 16, 2003, consistent with the magistrate's order, the parties, by joint stipulation, agreed to litigate the factual issues obtained in discovery and the legal issues arising therefrom also litigated in summary judgment proceedings at trial. App. 92-99.

On March 3, 2004, the District Court denied the Town's motion to dismiss leaving intact Petitioner's First Amendment, equal protection, impairment of contract, substantive and procedural due process claims under the civil rights count. The adopted report and recommendation found that the Petitioner had sufficiently alleged that the Town had through pre-textual, retaliatory, arbitrary and capricious conduct, caused the diminution in the value of the Petitioner's property. App. 114-116.

Also on March 3, 2004, the district court denied the Town's motion to strike Petitioner's expert witness and report as untimely filed. The report supported the diminution in value of Petitioner's property based in part on the

loss of the seventy-foot building height use and the application of the thirty-five foot height restriction.

On March 24, 2004, the district court granted the Town's motion for summary judgment on all claims. The district court, in footnote three of its opinion, *sua sponte*, excluded Petitioner's arguments and evidence that the Town's thirty-five foot building height restriction was in violation of state law and its own controlling comprehensive plan by invoking the *Rooker-Feldman* doctrine even though Petitioner was not a losing party in state court, not party to the settlement in that case, and his case was filed well before the entry of the state court judgment. Petitioner was not given an opportunity to brief the issues as to the *sua sponte* invocation of *Rooker-Feldman*. App. 39-84.

On April 7, 2005 the Eleventh Circuit Court of Appeals affirmed to the district court's summary judgment to the extent that it lacked subject matter jurisdiction. However, the Eleventh Circuit determined that the district court did not decide the issue of subject matter jurisdiction in terms of justiciability. The Court of Appeals held *sua sponte*, that Petitioner lacked standing to challenge the rezoning of his property that was accomplished through the rescission of the development agreement since he was not a third party beneficiary to the agreement. The Appellate Court also held that the loss of the Petitioner's previous seventy-foot building height use and the application of the thirty-five foot building height restriction was not before the court. Petitioner was not given an opportunity to brief the new issues raised *sua sponte* by the Court of Appeals.

REASONS FOR ALLOWANCE OF THE WRIT

QUESTION 1. Does an affected landowner lack standing to challenge the validity of a comprehensive zoning change to his property as an unreasonable and arbitrary exercise of legislative power because the landowner was not a third party beneficiary to a development agreement with a governmental entity that previously established the zoning classification of his property?

This Question can be fairly restated as: should the standing long established in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (hereinafter *Euclid*) and uniformly recognized throughout the federal and state courts for 88 years now be modified to exclude all cases involving a landowner who entered a sales contract with a developer? *Euclid* states:

> "A suit to enjoin the enforcement of a zoning ordinance with respect to the plaintiff's land, need not be preceded by any application on his part for a building permit, or for relief under the ordinance from the board which administers it, where the gravamen of the bill is that the ordinance of its own force operates unconstitutionally to reduce the value of the land and destroy its marketability, and the attack is not against specific provisions but against the ordinance in its entirety."

In the instant case, Petitioner held the right to build to seventy feet on his property before he entered the development contract with a developer and when the contract was abandoned, due to an arbitrary intervening rezoning of his property, he could no longer build to seventy feet. This injury occurred, according to his claim, because while the property was under contract the local

government retaliated against him for political reasons and altered his property rights. The Eleventh Circuit ruled that he had no standing to sue for his injury and articulated a new unprecedented bright line rule that profoundly modifies standing under *Euclid* so as to place it in conflict with *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001) and by implication, is inconsistent with due process, the guarantee of petitioning rights and other constitutional guarantees such as those recognized in the *Village of Willowbrook v. Olech,* 528 U.S. 526 (2000) (per curiam).

The Eleventh Circuit in its opinion held that,

> "Although the parties have not raised the issue here, we are obliged to consider, *sua sponte*, the question of our subject matter jurisdiction to hear the case before us. After thorough review, we conclude that Mr. Bochese lacks constitutional standing to challenge the rescission of the contract between the Town and the developer, since he was neither a party to nor an intended beneficiary of that agreement, and therefore lacks a legally enforceable interest in that contract. In short, we do not have the power to entertain the appeal."

See *Bochese* at 964. App. 1-38.

This case, although not involving a takings claim, is the one of those cases referred to in the majority opinion of *Kelo v. New London, Connecticut,* 545 U.S. ___ (slip opinion p. 17) (June 23, 2005) "involving an unusual use of governmental power": irrational government motive and property injury. While recognizing that *Kelo* was not a case involving arbitrary and capricious conduct, *Kelo, p. 7 and fn. 6,* this Court dispelled the predictions of dire consequences by *Kelo* and the dissent. Acknowledging the

continuing viability of *Euclid*, *Kelo, fn. 12*, the majority conveyed that *Kelo* was not a gateway to the "parade of horribles" predicted by *Kelo's* argument, *Kelo fn. 18*, because *Euclid* and *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam) and other constitutional guarantees stood as avenues of redress for those peculiar instances when arbitrary government conduct is alleged to have injured property rights. *Kelo, pp. 16-18 and fn. 17* The majority in *Kelo* answered the concerns over the hypothetical case in which irrational government conduct had been wielded to confer a private benefit with the acknowledgment that it would confront it when it arose. *Kelo, pp. 17, 18 fns. 17 and 18.* It is now before the Court. In a slightly different posture than predicted by the dissents in *Kelo*, the problem, as it is now presented, was presaged by the majority, *Kelo, fn. 24*, with the recognition that land development can occur through several mechanisms including secret contract negotiations. In this case the secret negotiation was between the developer and the Town wherein the developer was coerced into an agreement that downgraded the Petitioner's zoning and property value in exchange for the developer's continued violation of the Town's Charter. Hence the problem arrives in a form more closely resembling the equal protection violation described in concurrence by Justice Kennedy, *Kelo* (J. Kennedy, concurring, p. 1, p. 2). Because Bochese was not privy to the secret negotiation, not in direct contract with the Town nor a third party beneficiary, according to the Eleventh Circuit's new exception to *Euclid*, Petitioner has no standing to redress the injury he suffered as a result of the down zoning of his property.

The underlying controversy before the Court in *Kelo* was whether an unscrupulous local government can use

the powers of eminent domain to unfairly benefit a private person at the expense of another private person under a pretext of public benefit. In route to its ruling, this Court recognized land assembly and private development as an important trend in the reorganization and redevelopment of the Nation's urban landscape, recognized a long historical precedence of the taking for public use being frequently intertwined with private benefit and impliedly recognized the modern trend of privatization of governmental burdens. The majority opinion and concurrence, read as a whole, clearly recognized that the underlying concerns raised were redressable by other constitutional protections. Those other means of address are largely unavailable if a property owner injured by a rezoning of his property has no standing unless they are the developer. The developer itself is equally impacted; if no rational landowner will enter a contract contingent on rezoning and development approval, then developers will have to buy outright any land it wants to include in a development. Land assembly comes to a screeching halt the moment landowners learn that during the period of time their property is under the developer's contractual control it can be secretly down zoned or similarly impaired by an arbitrary or irrational government act and returned to them with no recourse. The *Bochese* opinion is inconsistent with the majority, concurrence and dissent in *Kelo*.

Accordingly, in the Eleventh Circuit, current property owners or subsequent property owners who are affected by an unlawful comprehensive zoning classification or zoning regulations will not be able to challenge the constitutionality of comprehensive zoning classifications and land use restrictions imposed upon their property if the governmental action is taken pursuant to a previous development

agreement. Such a limitation placed on *Euclid* would put *Euclid* in conflict with other decisions of this Court. The exception to standing created by the Court of Appeals effectively places an expiration date on the constitution. This Court has previously rejected such a rule or exception involving the takings clause that would have limited protection under the Fifth Amendment for some property owners and not others.

> "Were the Court to accept that rule, it would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable."

See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Clearly "A regulation or common-law rule cannot be a background principle for some owners but not for others." *Id.* Without question, the new rule or exception to standing created by the Eleventh Circuit raises similar concerns in the context of equal protection and also implicates the First Amendment because the new rule or exception to standing preventing affected landowners from challenging unconstitutional governmental regulation or action impermissibly impedes access to the courts and right to petition.

Consequently, because the appellate court determined that the Petitioner lacked standing to challenge the rezoning of his property because he was not a third party beneficiary under a development agreement and lacked standing, it excluded from its review material allegations and exhibits contained in the complaint and evidence in the record provided by the Petitioner pursuant to Fed.R.Civ.P. 56(c) and rulings by the district court that would have supported standing under the aforementioned precedent to wit: that Petitioner established that the

actions taken by the Respondent were arbitrary and irrational and caused a diminution in the value of his property.

The new Rule articulated by the Eleventh Circuit would severely impair or eliminate the alternative avenue of recourse suggested by *Kelo*. Every case currently in the federal pipeline that is based on a property owner who claims injury by an arbitrary rezoning must now be revaluated for standing if this Court does not accept immediate review.

Conflict with State Law

Review of this case is essential to resolve this important question of standing and to resolve the conflict between the U.S. Supreme Court, every other Federal Circuit and the Eleventh Circuit. Equally disruptive is the conflict between the new rules of standing with the long standing Florida precedence based on the same jurisprudence as *Euclid*.

The Appellate Court in so holding has created an exception to the settled principles under Florida law that an affected landowner, clearly has the right to challenge such a zoning decision on the basis that it was an arbitrary and unreasonable exercise of the Town's valid police powers. *Skaggs-Albertson's v. ABC Liquors Inc.*, 363 So.2d 1082 (Fla.1978); *Rinker Materials Corp. v. Metropolitan Dade County*, 528 So.2d 904 (Fla. 3rd DCA. 1987). A multitude of cases recognize that even neighboring property owners affected by zoning changes have standing to challenge the changes. *Wingrove Estates Homeowners Ass'n v. Paul Curtis Realty, Inc.*, 744 So.2d 1242, 1243 (Fla. 5th DCA. 1999).

While development agreements are expressly permitted by the Florida Statutes between local governments and developers. See §§ 163.3220-.3243, Fla. Stat. (1999); *Morgran Co. v. Orange County*, 818 So.2d 640, 643-644 (Fla. 5th DCA 2002). Such authority is not without limitation because a local government cannot enter into contractual obligations inconsistent with its valid police powers. *Id.* Consequently, it cannot be said that local governments in the formation or rescission of development agreements can cause a diminution in value of land owned by others who are not intended beneficiaries of a development agreement based on arbitrary and irrational reasons. Nor can a local government by entering into such an agreement foreclose standing of an affected property owner to challenge such a zoning decision by labeling it simply a rescission of a contract. The action is still legislative. *P.C.B. Partnership v. Largo*, 549 So.2d 738, 741 (Fla. 2nd DCA, 1989).

By holding that the Petitioner lacks standing to challenge the down-zoning of his property and the restrictions flowing therefrom simply because he was not a third party beneficiary to a development agreement, the Eleventh Circuit's new rule limiting standing is irreconcilable with the decisions under Florida law and of this Court.

QUESTION 2. Does the "well-pleaded complaint" rule allow an appellate court in de novo review of summary judgment of a civil rights claim to ignore exhibits attached to the complaint and issues tried by express consent?

Nothing is more elementary to the uniformity of decisions in the federal courts than the rules by which the appellate court examines subject matter jurisdiction. The

great discrepancy between the rule of review now invoked by the Eleventh Circuit in *Bochese* and those rules of review employed by the other circuits and endorsed by this Court is so great as to not only place the Eleventh Circuit in conflict but so as to destroy the uniformity of decisions at the foundational level.

The "well-pleaded" complaint rule has long been used to determine whether a case removed from state court properly raises federal jurisdiction. *Metcalf v. Watertown* 128 U.S. 586 (1888). It is well established that the appellate court looks no further than the face of the complaint to determine federal jurisdiction. *Phillips Petroleum v. Texaco, Inc.*, 415 U.S. 125, 128 (1974). The "well-pleaded" complaint rule is routinely applied to jurisdictional questions in instances of removal from state court jurisdiction, federal questions raised for the first time in defensive pleadings and federal statutory actions that routinely involve supplemental state claims such as ERISA and patent infringements. Does it apply in all federal cases? How is it reconciled with the federal procedural rules? The continued viability of the "well-pleaded complaint" rule cannot be challenged. *Aetna Health v. Davila*, 542 U.S. 200 (2004); *Exxon Mobil Corp. v. Allapattah Servs.*, U.S. Lexis 5015 (June 23, 2005). However its application to the Federal Rules of Civil Procedure has not been clearly articulated, particularly: does the "face of the complaint" exclude exhibits attached to the complaint, referenced within it and incorporated in the pleadings by Fed.R.Civ.P. Rule 10(c)? Should an appellate court accept stipulated pretrial statements that would raise issues to be tried by express consent as a basis for subject matter jurisdiction pursuant to Fed.R.Civ.P. Rule 15(b)? Does the "well-pleaded complaint" rule still apply in the de novo review of

a summary judgment on a claim brought pursuant to 42 U.S.C. 1983? If the face of the complaint, excluding attached exhibits, raises the basis of the subject matter jurisdiction, can it, consistent with liberal notice pleading rules, be dismissed *sua sponte* because it "merely mentions" the basis of the claim?

The Eleventh Circuit opinion in *Bochese* raises all of these questions when it decided subject matter jurisdiction in the instant case:

> "We are bound by the contents of the plaintiff's pleadings, even on summary judgment. Facial attacks on the complaint "require the court *merely* to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction"

Bochese v. Town of Ponce Inlet, 405 F.3d 964, 974 (11th Cir. 2005). App. 1-38.

The Petitioner contends that the conflict with the other Circuit Courts of Appeal on the application of Federal Rules of Civil Procedure, particularly Rule 10(c) and Rule 15(b), to evaluations of subject matter jurisdiction raises a sufficiently substantial constitutional question to invoke the certiorari jurisdiction of this Court or in the alternative merits review under the question of whether a total disregard for Fed.R.Civ.P. Rules 10(c) and 15(b) constitute such a departure from the usual and accepted course of judicial proceedings to warrant this Court granting this petition for certiorari. Can an appellate court simply refuse to look past the *face* of a complaint when evaluating subject matter jurisdiction?

Review of this case is essential to resolve the conflict between the Eleventh Circuit and other Circuit Courts

of Appeal that have held that affidavits and exhibits attached to a complaint are part thereof for all purposes, including review by appellate court of dismissal of complaint for lack of jurisdiction and failure to state a claim. *Schnell v. Chicago*, 407 F.2d 1084 (7th Cir. 1969). A court may even also consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." See *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994). Similarly, are complaints superceded when issues are tried by express or implied consent pursuant to Fed.R.Civ.P. 15(b)? Contrary to the decision of the Eleventh Circuit, the Second and the Eighth Circuits have also held that courts of appeal may amend a complaint constructively to recognize unpleaded claims and use Fed.R.Civ.P. 15(b) by analogy. This Court has never decided under what circumstances a court of appeals could furnish itself a jurisdictional basis by deeming the complaint amended in light of the parties' 'express or implied consent' to litigate a claim. Petitioner believes that the invocation of the Court's inherent power is necessary so to establish a uniform rule and is necessary in order to restore Fed.R.Civ.P. as rules on which litigants can rely as a viable means to plead and amend a complaint in the Eleventh Circuit.

The procedural aspects of this case demonstrate why this Court should invoke its inherent power in that the abrogation or in the alternative, the departure from Fed.R.Civ.P. Rules 10(c) and 15(b) will undoubtedly cause additional civil actions to be filed which ordinarily would have been resolved in the first action. Left unresolved, the Eleventh Circuit's Rule that a court at summary judgment stage can only look to the face of a complaint to see what

claims are raised will unnecessarily increase judicial labor and add tremendous expense by requiring litigants to file new lawsuits. The Eleventh Circuit's Rule is contrary to the general policy that at some point all litigation must come to an end wherein res judicata or collateral estoppel applies. There is little doubt that the Eleventh Circuit has announced a procedural rule rather than simply committed an error. See *Urfirer v. Cornfeld*, 408 F.3d 710 (11th Cir. 2005).

The Eleventh Circuit's Rule is contrary to the express purpose of Fed.R.Civ.P. 15(b) and would also have the effect of invalidating final pre-trial orders that normally amend to some extent a complaint since all pleadings merge into such an order under Fed.R.Civ.P. 16(e). Assuming the Eleventh Circuit did not intend to abrogate Fed.R.Civ.P. 15(b), its avoidance of Fed.R.Civ.P. 15(b) by the Rule it announced when considered with its *sua sponte* determination of subject matter jurisdiction without providing the Petitioner the opportunity to present legal arguments, is an extreme departure from the accepted and usual and course of judicial proceedings since it also impacts other rules of procedure such as pre-trial orders. To hold otherwise, would freeze all issues and claims as they stand by the deadline for amendments in a case management scheduling orders unless amendments were permitted under Rule 16(b).

"Fed. R. Civ. P. 15(b), which provides in language that could not be clearer that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. In other words [they provide] the issue that wasn't in the complaint. ***but failure so to amend does not affect the result of the trial of***

these issues (emphasis added). *Torry v. Northrop Grumman Corp.*, 399 F.3d 876, 878-879 (7th Cir. 2005) ("The words that we have italicized show that Northrop Grumman's insistence that the plaintiff had to amend the complaint to add a charge of racial discrimination is frivolous."); *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1013 (6th Cir. 1999).

Because the parties tried by express consent the claims and issues related to the loss of the permissible seventy-foot building height use in the T1 zoning classification that also caused a diminution in the Petitioner's property, it was unnecessary for the Petitioner to file a motion to amend his complaint pursuant to Rule 15(b) based on its express terms. See *Torry*, *supra*. Petitioner believes that the handwritten note on the Order denying the Second Amendment expressed this very point.

On December 18, 2003, the parties entered into an express stipulation pursuant to a joint pre-trial statement to try the validity of the thirty-five foot building height restriction imposed on the Petitioner's property under the Town Charter. The facial challenge to the validity of the building height restriction and repeal of the seventy-foot building height allowable use was set forth under issues of fact that were admitted, issues of fact in dispute and issues of law for the district court to decide sections in the express stipulation. The issues and claims jointly stipulated to that were admitted relevant to the Rule 15(b) issue are attached as App. 92-99 but typical of the twenty seven paragraphs that raised the issues that the appellate court declined to recognize as before the court was:

> Violating and abridging Bochese's right under the Equal Protection clause by singling him out for disparate treatment compared to other

> surrounding property owners similarly situated without any rational basis when the Town rezoned his property. The Town down zoned-spot zoned his property from PUD to T1. Unlike the surrounding properties, the Town adopted and applied to Bochese's property, in violation of state law, a T1 zoning classification that bears no relationship to the public health, safety, morals, or general welfare. The Town completely failed to articulate any rational reason whatsoever for the down zoning-spot zoning. The Town repealed ordinance 84-11 which allowed buildings heights up to 70 ft. adopted building height regulations in violation of State law and the Town's comprehensive plan and applied these invalid regulations to Bochese's property. The Town intentionally singled out Bochese when it prohibited the construction of a building 70 ft. in height on Bochese's property. Other property owners similarly situated in the same zoning classification were permitted to build to height of 70 ft. Based on the Town's arbitrary and capricious, irrational and bad faith conduct; the Town's actions exceeded its police powers. App. 92-99.

And paragraphs such as:

> Ordinances "which rezone specific parcels of private real property or which substantially change permitted use categories in zoning districts" are subject to the more rigid requirements of Section 166.041(3)(c). This case involves the rezoning of *public* real property. Because no notice was given to plaintiff, it is immaterial (and this court need not decide) whether section 166.041(3)(a) or 166.041(3)(c) governs this action. Fla. Stat. (1981). Again, to the extent the Charter's invalid 35 ft. height restriction was used as basis to rescind the

> Fourth Amendment Development Agreement; the TOWN'S action was wholly arbitrary and irrational. App. 92-99.

The same issues of facts that were admitted, issues of fact which were to be litigated and issues of law to be decided by the court included in the pre-trial stipulation, see App. 92-99, were raised in the Town's summary judgment motion and in the response thereto. While the Town claimed in its motion that its Charter controlled and that the disposition of the propriety of the Town Charter's thirty-five height restriction over Ordinance 84-11's exception was decided by the state court, the Petitioner came forward with evidence and argued in response that the Charter building height restriction was void *ab initio* because it was enacted in violation of the procedures of Fla. Stat. 166 and violated the express provisions of Fla. Stat. 163 since the Charter provision violated the Town's policies set forth in its comprehensive plan.

The district court in deciding the merits of the case, excluded the arguments and facts surrounding the validity of the Charter building height restriction and the repeal of the seventy-foot building height use of the Petitioner's property on the basis of the *Rooker-Feldman* doctrine not because these claims and issues were not before the district court. To be sure, the district court, prior to its entry of summary judgment, allowed Petitioner to amend his answers to the Town's requests to admit and interrogatories which defined the issues and claims before the court and denied the Town's motion to strike as untimely the Plaintiff's expert report on damages that raised the loss of the seventy-foot building height as a concrete damage suffered by the Petitioner. Unlike the circumstances in *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800,

814-815 (1988), the record of this case is replete with evidence that the issues and claims excluded by the Eleventh Circuit were tried by express consent.[3]

While this Court in *Christianson* indicated that it had never decided under what circumstances a court of appeals could furnish itself a jurisdictional basis by deeming the complaint amended in light of the parties' 'express or implied consent' to litigate a claim, the concurring opinion by Justice Stevens did reflect that **"such an approach to a jurisdictional** (question analogous to Rule 15(b) **is sound"** *Christianson* at 824.

The Eighth and the Second Circuits' are in agreement that appellate courts may constructively amend complaints using the analogous Rule 15(b) standards wherein litigants have tried the claims and issues by express or implied consent. *Triple Five of Minn., Inc. v. Simon*, 404 F.3d 1088, 1095 (8th Cir. 2005); *City of Rome v. Verizon Communs., Inc.*, 362 F.3d 168 (2d Cir. 2004).

Petitioner requests that Court grant the petition to resolve the conflict between the appellate courts on the applicability of Rule 10(c) and the viability of Rule 15(b) so as to promote uniformity of the application of the Fed.R.Civ.P. Rule 15(b). In the alternative, this petition should be granted given that the Eleventh Circuit's considerable departure from the usual and accepted course of

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[3] The fact that the district court erroneously applied *Rooker-Feldman* to a non-party to state court judgment and to parallel federal litigation is not dispositive to the issue of whether the claims and issues were litigated by express consent or whether the Petitioner had standing to raise the issue and claim in light of this Court's recent decision in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005).

judicial proceedings will cause great confusion, unnecessary judicial labor and expense.

QUESTION 3. Is the due process clause of the Fourteenth Amendment of the United States Constitution violated when litigants are not provided the opportunity to present legal arguments to subject matter jurisdiction challenges raised *sua sponte* by the court of appeals wherein those excluded legal arguments would have altered the court of appeals *sua sponte* determination as to its own jurisdiction?

Review of this case is essential to resolve the tension between the Circuits to define the procedural safeguards consistent with the Due Process Clause under the Fourteenth Amendment that should be employed when an appellate court, *sua sponte,* examines an issue not specifically addressed below in a district court. The Petitioner requests that Court grant the petition so that it can decide whether appellate courts must first consider whether litigants would suffer any procedural unfairness or prejudice before an appellate court decides to address an issue not presented below and where such unfairness and prejudice do exist, that litigants should be provided the opportunity to present legal or factual arguments to meet *sua sponte* challenges by the appellate courts.

The prejudice created by the *sua sponte* decision by the district court to erroneously exclude Petitioner's evidence based on the erroneous application of the *Rooker-Feldman* doctrine was compounded by the Eleventh Circuit through its own *sua sponte* determination of subject matter jurisdiction. The appellate court acknowledged that the district court did not address subject matter jurisdiction in terms of justiciablity, (*Bochese v.*

Town of Ponce Inlet, 405 F.3d 964, 973 (11th Cir. 2005), and found it necessary to, *sua sponte*, consider the question of subject matter jurisdiction on completely different grounds. Like the district court, the Eleventh Circuit never provided the Petitioner an opportunity to present legal arguments or point to facts in the record to meet its challenge.

The decision by the Eleventh Circuit not to provide the Petitioner with an opportunity to present meritorious legal arguments contained in the first two questions presented in this petition to its *sua sponte* challenges to subject matter jurisdiction is in conflict with the decisions of several circuit courts of appeal and the concerns of this Court that litigants should not be surprised on appeal by a final decision of issues upon which they have had no opportunity to present legal arguments where it cannot be said that the proper resolution is beyond doubt. *Singleton v. Wulff*, 428 U.S. 106, 120-121 (1976).

Five Circuit Courts of Appeal have recognized that litigants should generally have the opportunity to present legal arguments to issues not raised below as a matter of fairness. *In re Cheney*, 357 U.S. App. D.C. 274 (D.C. Cir. 2003); *Midway Fin. Corp. v. Walters*, 1992 U.S. App. LEXIS 32229, 5-6 (9th Cir. 1992); *Row v. Casey*, 623 F.2d 829, 841 (3d Cir. 1980); *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 720-721 (10th Cir. 1993); *National Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 628 (1st Cir. 1995); cf. *Coggin v. Longview Indep. Sch. Dist.*, 337 F.3d 459, 470-471 (5th Cir. 2003) (dissent objecting to the court's failure to follow this rule).

The First Circuit has explained that the absence of unfairness has a definite bearing on a decision to overlook

this type of procedural default. *National Ass'n of Social Workers* at 628. The First Circuit maintains a rule that an appellate court must first examine whether the plaintiff would **suffer any procedural unfairness** if it addressed the omitted issue. *Chestnut v. City of Lowell*, 305 F.3d 18, 24 (1st Cir. 2002).

By contrast, the Eleventh Circuit failed to consider if the Petitioner would suffer any procedural unfairness or prejudice if it did not provide the Petitioner with an opportunity to respond to its *sua sponte* challenge to subject matter jurisdiction. The decision by the Court of Appeals not to give the Petitioner an opportunity to respond to its *sua sponte* challenge to standing was made despite the fact it acknowledged in its published opinion that the case at bar was complex.

The decision by the Court of Appeals not to provide Petitioner with an opportunity to present legal arguments to its *sua sponte* challenge to standing has also caused at a minimum, a substantial departure from the standing principles long established in *Village of Euclid v. Ambler Realty, supra* and uniformly recognized throughout the federal and state courts for 88 years. Its published decision, also due to the *sua sponte* decision, without notice, departs from the procedures established by the rules of procedure under both Fed.R.Civ.P. 15(b) and 16(e). Similar results will reoccur if there is no standard of prejudice applied to the *sua sponte* question.

Moreover, the decision not to provide the Petitioner with the opportunity to present legal arguments and point to critical evidence in the record of various orders, clarifications thereof or express stipulations by the parties departs from the accepted and usual course of judicial

proceedings based on its own previous rules for providing procedural safeguards to litigants. *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990).

While the Court of Appeals described its standing review as a facial attack on the face of the amended complaint, its *sua sponte* decision to examine standing missed or ignored exhibits attached and incorporated to the amended complaint and required a factual review of the record because of the amended complaint being superceded by issues tried by express consent and by the pretrial orders allowing those issues to be litigated. Because the issue of subject matter jurisdiction was intertwined with these other facts related to standing outside of the pure legal issue that provided standing presented by the first question in this petition, the Petitioner should have also been given the opportunity to be heard even under the narrow standards of the Eleventh Circuit. *Dunbar* citing *Eaton v. Dorchester Development, Inc.*, 692 F.2d 727 (11th Cir. 1982).

Even though the decision not to provide the Petitioner an opportunity to meet the *sua sponte* challenge to standing may not rise to the level of an express conflict with the other Circuits, it certainly at a minimum, raises significant tension with the decisions of those circuit courts of appeal and the concerns of this Court over procedural fairness.

The consequences of such a departure cannot be understated since the Eleventh Circuit has, as a result, created a new rule in terms of standing and disturbed almost a century of jurisprudence on the subject by its published opinion that requires this Court's review. Accordingly, review is also warranted not only to establish

proper uniform procedural safeguards for litigants, the uniform application for the rules of procedure, but also through those same procedural guidelines, it will prevent appellate error on substantive issues from being published. This worthy goal is not only consistent with due process but will, without a doubt, promote judicial economy by preventing unnecessary litigation.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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Alfred L. BOCHESE, Plaintiff-Appellant

v.

TOWN OF PONCE INLET, a municipal corporation organized under the laws of the State of Florida, Defendant-Appellee.

No. 04-11542.

United States Court of Appeals,
Eleventh Circuit.

April 7, 2005.

Appeal from the United States District Court for the Middle District of Florida.

Before EDMONDSON, Chief Judge, and MARCUS and PRYOR, Circuit Judges.

MARCUS, Circuit Judge:

Appellant Alfred L. Bochese brought this suit against the Town of Ponce Inlet ("the Town" or "Ponce Inlet") challenging, under 42 U.S.C. § 1983, the Town's rescission of a contract it had entered into with a private developer for the construction of an oceanfront condominium complex. In essence, Mr. Bochese claimed that rescinding the contract violated his First Amendment free speech, Fourteenth Amendment due process, Fourteenth Amendment equal protection, and Article I, § 10 contract rights. The district court granted summary judgment for the Town. It is from this judgment that Mr. Bochese now appeals. Although the parties have not raised the issue here, we are obliged to consider, *sua sponte,* the question of our subject matter jurisdiction to hear the case before us. After thorough review, we conclude that Mr. Bochese lacks constitutional standing to challenge the rescission of the

contract between the Town and the developer, since he was neither a party to nor an intended beneficiary of that agreement, and therefore lacks a legally enforceable interest in that contract. In short, we do not have the power to entertain the appeal.

I.

A.

The essential facts are these. Appellant Bochese has owned a single-family residence on an oceanfront lot in the Town of Ponce Inlet since at least November 8, 1983. Ponce Inlet, an incorporated municipality, was originally chartered in 1963, at which time its charter contained no zoning provisions. Over time, the Town enacted various zoning regulations; the following chronology highlights those salient to this case.

In 1983, the Town Council, Ponce Inlet's governing body, proposed an amendment to the Town Charter to establish a maximum height of 35 feet for all buildings. The amendment was approved by referendum in the Town's November election, and the Town Charter was amended to contain the provision: "Buildings within the Town of Ponce Inlet shall be limited to a maximum height of thirty-five (35) feet." This amendment contained no exemptions to or exclusions from the 35-foot height limit. R. 93, Ex. 58.[1]

[1] Our citations to the record in this case denote the number of the district court docket entry containing the cited material as "R. X," and any exhibit thereto as "Ex. X."

In May 1984, the Town Council adopted Ordinance 84-11, creating certain exceptions to the charter amendment's 35-foot height limit. Ordinance 84-11 stated that the limitation would not apply to properties zoned "T-1" ("Tourist Accommodation") or "PUD" ("Planned Unit Development") as of November 8, 1983. The ordinance further provided that PUD-zoned property "may be developed under the terms and provisions of applicable P.U.D. agreements between the Town and property owner, or developer of property classified P.U.D. as of November 8, 1983." The ordinance explained that it was the "interpretation of the Town Council that the charter amendment adopted by the electors does not require that all property presently zoned to permit buildings of a height in excess of thirty-five (35') shall be restricted in the future to prohibit buildings of a height no greater than thirty-five (35') feet." R. 93, Ex. 17. Subsequently, in November, 1985, the Town enacted Ordinance 85-27, which left Ordinance 84-11 intact, but established a maximum building height of 70 feet for all properties exempt from the 35-foot building height limit. R.93, Ex. 83, 7.

In July 1986, the Town adopted the third relevant Ordinance, 86-12, approving a Development Agreement with the predecessors of Ponce Lighthouse Properties, Inc. ("PLPI"). R. 93, Ex. 83, 8. The Development Agreement, signed by the mayor, all members of the Town Council, and the developer, laid out the rules, criteria, and details for a Planned Unit Development (PUD) project. The agreement stated that the Town Charter provision restricting building height to 35 feet did not apply to the PUD. The agreement further specified that the oceanfront section of the PUD would have a maximum building height of 35 feet,

while the rest of the property would have a maximum building height of 85 feet. R. 93, Ex. 19.

In 1990, the Town amended and readopted its charter. The new charter set forth the same 35-foot building height limitation, with no exemptions or exceptions. R. 93, Ex. 83, 10.

In February 2001, Ponce Lighthouse Properties, Inc. submitted a Development Review Application to the Town, seeking to include four contiguous 100-foot oceanfront lots in the existing PUD by changing their zoning from T-1 to PUD. Two of the four lots were vacant lots owned by PLPI; one was a residential lot owned by Michael DiFranco; one was a residential lot owned by Appellant Bochese. R. 93, Ex. 34. The Town's Land Development Code requires that at the time of submission of a PUD-related application, the applicant have unified ownership over the entire area within the PUD, which ownership must be maintained until after the recording of the overall development plan. Unified ownership means "under the ownership of one person, whether by deed, agreement for deed or contract for purchase." In its application to the Town, PLPI represented that all four lots "have either been purchased or [are] under contract to be purchased by [PLPI]." R. 93, Ex. 22. In fact, when PLPI submitted its application, PLPI and landowners Bochese and DiFranco had only signed letters titled "Proposal for Acquisition," each of which stated that it was "not a commitment to purchase or an offer to purchase on the part of PLPI." R. 112, Ex. 1.

Two months later, on April 18, 2001, the Town Council adopted Ordinance 2001-08, which repealed Ordinance 84-11 (exempting T-1 and PUD properties from the 35-foot rule) in its entirety and amended the Town's Land Use and

Development Code to eliminate all exceptions to the 35-foot building height restriction. R. 93, Ex. 38.

The following month, on May 21, 2001, the Town Council executed the Fourth Amendment to the Development Agreement ("Fourth Contract Amendment"), approving PLPI's request for inclusion of the four additional properties in its PUD. The Fourth Contract Amendment specified that up to 400 feet of PLPI's now-700-foot stretch of oceanfront PUD property (100 feet of which was Mr. Bochese's lot) could be developed with buildings up to 70 feet in height, but limited building height on the remaining 300 feet of the oceanfront property to 35 feet. R. 93, Ex. 37.

Several months later, on August 3, 2001, PLPI executed Purchase and Sale Agreements for both the Bochese and the DiFranco properties. R. 93, Exs. 43 & 44. The Bochese agreement, in substance, gave PLPI an option to purchase the Bochese lot. The agreement included an addendum providing: "The contract is subject to [PLPI] obtaining the necessary approvals from the Town of Ponce Inlet, Florida for the construction of a 70 foot high condominium in a manner and design acceptable to [PLPI] at [PLPI's] sole discretion. In the event [PLPI] has not received said approvals by the closing date, [PLPI] shall have the option to close pursuant to the terms of the contract or terminate this Contract at its sole discretion." The addendum further provided: "As a condition precedent to [PLPI]'s obligation to close, is [PLPI]'s closing with Michael DiFranco . . . , either simultaneously with or prior to the closing of this transaction." As consideration for this option to purchase, PLPI placed in escrow a deposit of $25,000, $10,000 of which Mr. Bochese was entitled to retain if PLPI elected not to exercise the option. The

contract set a closing date of December 1, 2001. R. 93, Ex. 43.

Apparently believing that PLPI would eventually purchase his property, Mr. Bochese decided to relocate. Within six months of executing the Purchase and Sale Agreement with PLPI, Mr. Bochese purchased real estate, developed building plans, and hired a builder to construct a home on his new lot. R. 44, 11.

In early November 2001, approximately a month prior to the original closing date, PLPI asked Mr. Bochese and Mr. DiFranco for extensions to their purchase agreements. Mr. Bochese agreed, and he and PLPI executed a second addendum to the agreement, extending the closing date to March 1, 2002. This second addendum provided that PLPI would make nonrefundable monthly payments of $1200 to the Bocheses "[a]s consideration for the extension of the closing date." The second addendum also echoed the language of the first, making the Town's approval of a 70-foot condominium in a manner acceptable to PLPI a condition precedent to PLPI's purchase of Mr. Bochese's land. R. 93, Ex. 43.

Mr. DiFranco refused the extension, and his purchase agreement expired as scheduled on December 1, 2001. The expiration of the DiFranco agreement had the effect of destroying PLPI's unified ownership of the PUD property. Shortly thereafter, on December 31, 2001, Mr. DiFranco informed the Town that PLPI no longer had a contract to purchase his property, and requested removal of his property from the PUD by repeal of the Fourth Contract Amendment. R. 93, Ex. 61.

Meanwhile, on December 1, 2001, an amended Town Charter took effect, providing, without exception, that

"[b]uilding within the Town of Ponce Inlet shall be limited to a maximum height of thirty-five (35) feet." R. 93, Ex. 83, 14.

Several months after Mr. DiFranco requested removal of his property from the PUD, the Town Council held a public meeting on the subject. PLPI and Mr. Bochese both addressed the Council, and Mr. Bochese expressed his opposition to removal of his property from the PUD. At this meeting, on February 27, 2002, the Town Council adopted Resolution 2002-10, rescinding the Fourth Contract Amendment (which had added the Bochese and DiFranco lots into the PUD). R. 93, Ex. 75. Resolution 2002-10 listed as grounds for rescission of the Fourth Contract Amendment that PLPI had falsely represented that it controlled all of the properties to be incorporated into the PUD at the time it applied for their inclusion; that PLPI had no valid contract on the DiFranco property at any point, since the purchase agreement had failed to include Mrs. DiFranco as a party; that the DiFranco agreement expired on December 1, 2001, leaving PLPI with no legal entitlement to purchase the DiFranco lot; and that the DiFrancos no longer wished to sell their property, and demanded its removal from the PUD. R. 93, Ex. 75, § 2.

The rescission of the Fourth Contract Amendment removed the four beachfront lots (including Mr. Bochese's and Mr. DiFranco's) from PLPI's PUD, restoring those properties to their prior T-1 zoning classifications. The Town also proposed a Fifth Amendment to the Development Agreement ("Fifth Contract Amendment"), which, by its terms, permitted PLPI to proceed with the construction

of a condominium complex reaching a maximum height of 70 feet.[2] R. 93, Ex. 75, Ex. B.

Soon thereafter, the Town filed an action for declaratory judgment against PLPI in the Circuit Court, Seventh Judicial Circuit, in and for Volusia County, Florida, on the issue of "whether [PLPI] has a right to build a structure to a height in excess of thirty-five feet on the . . . property here in dispute, in apparent violation of the [Town] charter." *Town of Ponce Inlet, Fla. v. Ponce Lighthouse Properties, Inc.*, No. 2002-20561 CICI, at 10 (Fla. 7th Cir.Ct.2003) (R. 93, Ex. 83). The declaratory action named PLPI, Mr. Bochese, and Mr. DiFranco, as well as several other property owners, as parties. Mr. Bochese, however, was voluntarily dismissed as a party after he filed a motion to dismiss the declaratory action. Nevertheless, PLPI maintained that it had an interest in the Bochese lot, and thus that property was included in the disposition of the declaratory action.

The Florida circuit court reasoned that the Town Charter was equivalent to a municipal constitution, and thus was controlling unless it conflicted with state or federal law. *Id.* at 11. Accordingly, the court ruled that the Town could not have granted PLPI the right to build over thirty-five feet without violating the Town Charter. It concluded: "At the time of repeal of Ordinance 84-11 and

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[2] The district court stated that the Town "adopted" the Fifth Contract Amendment at the February 27, 2002 Town Council meeting. Order at 6 (citing R. 125, at 13). However, the portion of the record cited by the district court states only that the Town Council adopted Resolution 2002-10, and in fact we cannot discern from any part of the record in this case whether the Town and PLPI ever adopted the Fifth Contract Amendment.

the approval of the [Fifth Contract Amendment], no construction had yet begun on the properties zoned T-1 added to the PUD, and regardless of any vested rights of the PUD, no such estoppel rights attended the added property, and the Town is entitled to declaratory relief that the development proposed by [PLPI] . . . is subject to the 35 foot height limit." *Id.* at 12.

PLPI never closed on its agreement to purchase Mr. Bochese's property or sought another extension of the closing date. A handwritten note on the second addendum to the sale agreement indicates that PLPI at some point agreed to continue to pay the Bocheses $1200 per month through November, 2002, apparently to keep open the option to purchase. R. 93, Ex. 43. In a November 17, 2002 letter to Mr. Bochese, PLPI explained the reasons the contract did not close: "Unfortunately the delays caused by the pending controversy and litigation between the Town of Ponce Inlet and Ponce Inlet Properties Inc. regarding the issues of the 70 ft. building height and the Preston line will prevent us from closing under our current agreement. It was a shame that the Town rezoned your property back to the T1 classification last February. But for that change in the zoning classification we would have closed on the sale of your property back in March under the previous agreement." R. 44, Ex. B.

During the period of his negotiations with PLPI, Mr. Bochese engaged in certain whistleblowing activities related to the Town's compliance with Federal Emergency Management Agency (FEMA) regulations governing the Town's participation in the National Flood Insurance Program, which enables the Town to obtain flood insurance discounts for its residents by enforcing certain requirements designed to reduce flood risks. To maintain

its eligibility for the discounts, the Town had to certify annually to FEMA that it was enforcing those requirements. Mr. Bochese alleges that the Town was falsely certifying its compliance.

Mr. Bochese's whistleblowing centered around alleged misconduct by the Town Attorney, Mr. Doran. On April 18, 2001, Mr. Bochese complained at a Town Council meeting that Mr. Doran's legal fees had greatly exceeded the sums budgeted for them, and that the Town was neglecting its oversight duties. On July 4, 2001, Mr. Bochese filed a code enforcement complaint with the Town, alleging that the Inlet Harbor Restaurant, which was partially owned by Mr. Doran, had been reconstructed in violation of the FEMA regulations and the Town's Land Development Code. Two weeks later, at the July 18, 2001 Town Council meeting, counsel for Mr. Bochese made a presentation arguing that the Town and Mr. Doran had been falsifying official public documents to conceal various FEMA code violations involving the Inlet Harbor Restaurant and other properties. Mr. Bochese provided a letter, an affidavit, and other documents as evidence of the violations.

On September 18, 2001, Mr. Bochese filed a complaint with the Florida Bar against Mr. Doran. The complaint alleged that Mr. Doran's ownership interest in the Inlet Harbor Restaurant and his firm's representation of that restaurant created a conflict of interest that should preclude him from handling the Town's FEMA compliance matters. The Florida Bar investigated and concluded that there was no probable cause to proceed against Mr. Doran.

The *Daytona Beach News Journal* ran an article focusing on the Town's FEMA problems and on Mr. Doran. Subsequently, the Town Council declared its support for

Mr. Doran, enacting Resolution 2001-22, which Mr. Bochese has dubbed the "Terrorism Resolution," since it refers to the Town and Mr. Doran as being "terrorized" by "a propaganda campaign" waged by "greedy litigants." The resolution, adopted December 12, 2001, declares that "the Town Council will no longer sit idly and we are directing the Town Attorney and Town Manager to go on the offensive." R. 112, Ex. 36.

B.

On October 23, 2002, Mr. Bochese filed suit against the Town in the United States District Court for the Middle District of Florida under 42 U.S.C. § 1983, claiming that the rescission of the Fourth Contract Amendment and the concomitant rezoning of his lot was retaliation for his whistleblowing activities and violated a number of his constitutional rights. Mr. Bochese alleged violations of his First Amendment free speech, Fourteenth Amendment substantive due process, Fourteenth Amendment procedural due process, Fourteenth Amendment equal protection, and Article I, § 10 contract rights. In addition, he raised a common law claim for negligent supervision and retention of Mr. Doran.

The district court granted summary judgment for the Town on all of Mr. Bochese's claims. Initially, the district court conducted an analysis that, in substance, closely resembled a standing determination, although the court did not frame it in justiciability terms. First, the court found that Mr. Bochese had not suffered any injury as a result of the Town's rescission of the Fourth Contract Amendment, since "his prospects for financial gain under his contingent purchase and sale agreement were speculative at best."

Order at 13. The court observed that, "[w]hile the fourth contract amendment purported to grant both the necessary zoning and building height limitation to PLPI, no rights were conferred upon Mr. Bochese because the purchase and sale agreement still gave PLPI 'sole discretion' to decide what approvals were 'necessary' and whether the approvals PLPI obtained were 'acceptable' in terms of the 'manner and design' of construction." *Id.* (quoting the Purchase and Sale Agreement, R. 93, Ex. 43).

Next, the district court found that even if Mr. Bochese had suffered an injury, its cause was not any action by the Town, but rather PLPI's exercise of its contractual discretion not to exercise its option to purchase the Bochese lot. *Id.* at 16-17. Finally, the court found that there was no remedy it could provide Mr. Bochese, since even if it reinstated the Fourth Contract Amendment, the Town Charter's 35-foot building height limit would independently bar PLPI from obtaining zoning approval for a 70-foot condominium, which was a condition precedent to its purchase of the Bochese property (and thus to Mr. Bochese's realization of any profit). *Id.* at 17. Accordingly, the district court concluded that "[b]ecause Mr. Bochese suffered no injury or damages that were caused by the Town's actions, the Town is entitled to summary judgment on all of Mr. Bochese's claims." *Id.*

In spite of apparently concluding that the plaintiff lacked standing (albeit without ever quite saying that), the district court then proceeded to analyze the merits of Mr. Bochese's claims. Initially, the court concluded that the Town bore no § 1983 liability, because Mr. Bochese had failed to demonstrate either an official Town policy or a pervasive Town practice of unconstitutional retaliation, either of which, the court found, was necessary to establish

municipal liability under § 1983. *See* Order at 18-30. Accordingly, the court granted the Town's motion for summary judgment on Mr. Bochese's § 1983 claims.

The court also proceeded to analyze and reject each of Mr. Bochese's constitutional claims in turn. As to the First Amendment retaliation claim, the court found insufficient evidence that the Town's zoning decision was substantially motivated by Mr. Bochese's whistleblowing activities. *Id.* at 30-31. On the substantive due process claim, the court concluded that Mr. Bochese had no "fundamental right" in the zoning of his land. *Id.* at 32-34. As to procedural due process, the court found no deficiency in the procedures by which the Town rescinded the Fourth Contract Amendment. *Id.* at 35-37. On the equal protection claim, the court determined that Mr. Bochese had failed both to identify any similarly situated individuals who were treated differently than he, and to establish that, if any such disparate treatment had occurred, it was intentional. *Id.* at 37-39. As to the impairment of contract claim, the court said that the rescission of the Fourth Contract Amendment in no way affected the contractual relationship between Mr. Bochese and PLPI. *Id.* at 39-40. Finally, the court considered Bochese's common law negligent retention claim, concluding that Florida's sovereign immunity law barred liability for the decision to retain Mr. Doran, which was a discretionary decision of the Town government. *Id.* at 41-44.

Mr. Bochese now appeals from the district court's grant of final summary judgment for the Town on all of his § 1983 claims. He does not, however, challenge the district court's conclusion as to his common law negligent retention claim.

II.

A.

Although the parties have not directly raised the issue, there is a serious and substantial question as to Mr. Bochese's standing to bring this suit, which the district court plainly addressed (without labeling it a jurisdictional matter), and which we must address at the outset. "[S]tanding is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims." *Dillard v. Baldwin County Comm'rs,* 225 F.3d 1271, 1275 (11th Cir.2000) (citing *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); *Florida Ass'n of Med. Equip. Dealers v. Apfel,* 194 F.3d 1227, 1230 (11th Cir.1999); and *EF Hutton & Co., Inc. v. Hadley,* 901 F.2d 979, 983 (11th Cir.1990)).

In the absence of standing, a court is not free to opine in an advisory capacity about the merits of a plaintiff's claims. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1223 (11th Cir.2004) (quoting *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). "It is by now axiomatic that the inferior federal courts are courts of limited jurisdiction. They are 'empowered to hear only those cases within the judicial power of the United States as defined by Article III of the Constitution'. . . ." *Univ. of S. Ala. v. Am. Tobacco Co.,* 168 F.3d 405, 409 (11th Cir.1999) (quoting *Taylor v. Appleton,* 30 F.3d 1365, 1367 (11th Cir.1994)). Standing is a doctrine that "stems directly from Article III's 'case or controversy' requirement," and thus it "implicates our subject matter jurisdiction." *Nat'l Parks Conservation*

Ass'n v. Norton, 324 F.3d 1229, 1242 (11th Cir.2003) (citing *Vermont Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 771, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000)). In fact, standing is "perhaps the most important" jurisdictional doctrine, *Bischoff v. Osceola County,* 222 F.3d 874, 877-78 (11th Cir.2000) (quoting *United States v. Hays,* 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) (quoting *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 230-31, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990))), and, as with any jurisdictional requisite, we are powerless to hear a case when it is lacking. "Simply put, once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue." *Univ. of S. Ala.,* 168 F.3d at 410.

"A necessary corollary to the concept that a federal court is powerless to act without jurisdiction is the equally unremarkable principle that a court should inquire into whether it has subject matter jurisdiction at the earliest possible stage in the proceedings. Indeed, it is well settled that a federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking." *Id.* An appellate court "must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." *Id.* (quoting *Mitchell v. Maurer,* 293 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934)). Because this requirement "involves the court's competency to consider a given type of case," it "cannot be waived or otherwise conferred upon the court by the parties." *Id.* (quoting *Jackson v. Seaboard Coast Line R.R.,* 678 F.2d 992, 1000-01 (11th Cir.1982)). Accordingly, we are obliged to consider questions of standing regardless of whether the parties have raised them. *See, e.g., Hays,* 515 U.S. at 742, 115 S.Ct. 2431; *Dillard,* 225 F.3d at 1275; *Cuban Am. Bar*

Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1422 (11th Cir.1995) ("Before rendering a decision . . . every federal court operates under an independent obligation to ensure it is presented with the kind of concrete controversy upon which its constitutional grant of authority is based; and this obligation on the court to examine its own jurisdiction continues at each stage of the proceedings, even if no party raises the jurisdictional issue and both parties are prepared to concede it." (quoting *Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale,* 922 F.2d 756, 759 (11th Cir.1991))).

Accordingly, we begin by considering whether Mr. Bochese has constitutional standing to raise the claim he has brought here. Because we conclude that he does not, our inquiry ends with standing as well.

B.

We review a summary judgment ruling *de novo,* viewing the materials presented and drawing all factual inferences in a light most favorable to the non-moving party. *Nat'l Parks Conservation Ass'n,* 324 F.3d at 1236. Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The movant bears the burden of demonstrating the satisfaction of this standard, by presenting "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" that establish the absence of any genuine, material factual dispute. *Id.*

We review standing determinations *de novo. Dillard,* 225 F.3d at 1275 (citing *Eng'g Contractors Ass'n of S. Fla.,*

Inc. v. Metro. Dade County, 122 F.3d 895, 903 (11th Cir.1997)). "[E]ach element of standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.'" *Florida Public Interest Research Group v. EPA,* 386 F.3d 1070, 1083 (11th Cir.2004) (quoting *Bischoff,* 222 F.3d at 878 (internal quotation marks omitted) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992))). Accordingly, when a question about standing is raised at the motion to dismiss stage, "it may be sufficient to provide 'general factual allegations of injury resulting from the defendant's conduct.'" *Id.* (quoting *Bischoff,* 222 F.3d at 878). In contrast, when, as here, standing is raised at the summary judgment stage, "the plaintiff can no longer rest on 'mere allegations.'" *Id.* (quoting *Bischoff,* 222 F.3d at 878 (internal quotation marks omitted) (quoting *Defenders of Wildlife,* 504 U.S. at 561, 112 S.Ct. 2130)).

However, what precisely the plaintiff must prove depends on the nature of the challenge to his or her standing. As with any summary judgment determination, we look beyond the complaint, to the "depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," Fed.R.Civ.P. 56(c), in considering a "factual challenge" to standing. *See, e.g., Nat'l Parks Conservation Ass'n,* 324 F.3d at 1242. However, in making the necessary preliminary determination of *what claims the plaintiff has actually raised* (and therefore, what claims he must have standing to raise), we are bound by the contents of the plaintiff's pleadings, even on summary judgment. "Facial attacks" on the complaint "require[ ] the court merely to look and see if [the] plaintiff has sufficiently

alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true." *Lawrence v. Dunbar,* 919 F.2d 1525, 1529 (11th Cir.1990) (alterations in original) (quoting *Menchaca v. Chrysler Credit Corp.,* 613 F.2d 507, 511 (5th Cir.1980)) (internal quotation marks omitted).[3]

As the Supreme Court has explained, "[o]ne element of the case-or-controversy requirement is that appellees, *based on their complaint,* must establish that they have standing to sue." *Raines v. Byrd,* 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (emphasis added); *see also Focus on the Family v. Pinellas Suncoast Transit Authority,* 344 F.3d 1263, 1275 (11th Cir.2003) ("Article III standing must be determined as of the time at which the plaintiff's complaint is filed."). "Typically, . . . the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright,* 468 U.S. 737, 752, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). "Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted." *Warth,* 422 U.S. at 500, 95 S.Ct. 2197 (citation omitted).

It is not enough that "the [plaintiff]'s complaint sets forth facts from which we could *imagine* an injury sufficient to satisfy Article III's standing requirements," since "we should not speculate concerning the existence of

[3] The Eleventh Circuit has adopted as precedent the decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981).

standing, nor should we imagine or piece together an injury sufficient to give plaintiff standing when it has demonstrated none. The plaintiff has the burden to 'clearly and specifically set forth facts sufficient to satisfy [] Art. III standing requirements.' If the plaintiff fails to meet its burden, this court lacks the power to create jurisdiction by embellishing a deficient allegation of injury." *Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm'n,* 226 F.3d 1226, 1229-30 (11th Cir.2000) (emphasis added) (third alteration in original) (citations omitted) (quoting *Whitmore v. Arkansas,* 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)); *see also, e.g., Warth,* 422 U.S. at 518, 95 S.Ct. 2197 ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers."); *Shotz v. Cates,* 256 F.3d 1077, 1081 (11th Cir.2001); *Cone Corp. v. Fla. Dep't of Transp.,* 921 F.2d 1190, 1210 (11th Cir.1991); *Anderson v. City of Alpharetta,* 770 F.2d 1575, 1582 (11th Cir.1985). We therefore turn to Mr. Bochese's complaint[4] to determine whether he has raised a claim on which he is entitled to adjudication by this Court.

The task of discerning precisely what claims Mr. Bochsese [sic] has raised is complicated because Mr. Bochese has been something of a moving target, periodically recasting his arguments, throughout this litigation. Nevertheless, after careful review of Mr. Bochese's complaint, we understand him to be alleging that the Town's February 27, 2002 rescission of the Fourth Contract Amendment to its Development Agreement with PLPI,

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[4] References to the "complaint" are to Mr. Bochese's amended complaint, filed July 3, 2003 (R. 44).

which resulted in the removal of the Bochese lot from PLPI's PUD and restoration of its original T-1 zoning classification, injured Mr. Bochese by sabotaging his potentially very profitable prospect of selling the land to PLPI. The content of Mr. Bochese's complaint reveals that this challenge to the Town's February 27, 2002 rescission of the Fourth Contract Amendment is the *only* claim he has raised. We can find *nothing* in Mr. Bochese's complaint to suggest that he has challenged the Town's April 18, 2001 adoption of Ordinance 2001-08, which eliminated the previously existing exemptions from the Town's 35-foot building height restriction for T-1 and PUD property; the Town's readoption of its charter, effective December 1, 2001, to reflect this across-the-board application of the 35-foot building height limit; or any other action by the Town.

Subsequent to the filing of his complaint, Mr. Bochese attempted several times to recast his claims more broadly, as challenges to the Town's application of its 35-foot building height restriction to his property. The chronological development of Mr. Bochese's arguments is as follows. Mr. Bochese filed his initial complaint in this case on October 23, 2002. R. 1. On February 7, 2003, Mr. Bochese filed a motion to amend his complaint, which the Town opposed. R. 16. The district court, in its Case Management and Scheduling Order of April 17, 2003, set a deadline of May 5, 2003, for amending pleadings. R. 24. Nevertheless, the court granted Mr. Bochese leave to amend his complaint on May 29, 2003. R. 39. On July 3, 2003, Mr. Bochese filed an amended complaint, which raised additional state law claims and a common law negligent retention and supervision claim. R. 44. On November 3, 2003, Mr. Bochese again moved for leave to amend – this time, to amend the amended complaint of July 3, 2003 – which the

Town opposed. R. 87. Notably, the district court denied this motion on December 2, 2003, citing the May 5, 2003 deadline for amending pleadings. R. 122.

Mr. Bochese apparently sought to amend his complaint a second time to include, among other things, the allegation that the Town improperly applied its 35-foot building height restriction to his property. *See* R. 87, at 2-3.[5] His November 3, 2003 motion to amend explained that

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[5] Mr. Bochese's motion to amend the amended complaint stated that a copy of the proposed second amended complaint was appended to the motion; however, the record in this case contains no such copy, reflecting only that the motion – without any attachment – was filed with the district court. Nevertheless, Mr. Bochese included in the record excerpts he filed with this Court a copy of what apparently is the revised complaint he wished to file with the district court. The document, entitled "Civil Action by Second Amended Verified Complaint for Deprivation of Civil Rights, Negligent Supervision and Retention and Takings Claim Under Bert J. Harris Damages and Injunctive Relief Sought and Demand for Jury Trial," and referred to in the index to Mr. Bochese's record excerpts simply as "Second Amended Verified Complaint w/Attached Exhibits (R. 87)," bears *no* stamp indicating it was ever filed with the district court, and is not contained in the record. Nevertheless, Mr. Bochese submitted the document to this Court, apparently as if it were somehow part of the record in this case, without in any manner indicating that the district court had, in fact, denied his motion to file a second amended complaint. In fact, Mr. Bochese labeled this document "R. 87," in spite of the fact that record entry 87 consists only of his *motion* to amend the complaint a second time, and does not include the proposed complaint itself.

Litigants should need no reminding that the contents of the record are firmly fixed, and not subject to interpretation. Federal Rule of Appellate Procedure 10 makes clear that "[t]he following items constitute the record on appeal: (1) the original papers and exhibits *filed in the district court;* (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk." Fed. R.App. P. 10(a) (emphasis added). Eleventh Circuit Rule 30-1 further provides that the appellant must file "copies of the following portions, and only the following portions, *of the district court or tax court record. . . .*" 11th Cir. R. 30-1 (emphasis added). These rules leave no

(Continued on following page)

depositions of PLPI representatives had "revealed that the TOWN, on February 27, 2002, in addition to unlawfully down-zoning BOCHESE'S property, had also applied to his property an invalid zoning regulation," and that "[i]t was just discovered that in 1983 the TOWN had improperly adopted a zoning ordinance proposing a charter amendment limiting building heights to 35 ft. since the TOWN did not comply with specific notice requirements in violation of Florida law." R. 87, at 2. Mr. Bochese made arguments along these lines in his summary judgment brief to the district court, *see, e.g.*, R. 110, at 16-18, in his brief to this Court, *see* Appellant's Br. at 23-24, 43, and in oral argument before this Court, as well. However, the district court denied Mr. Bochese's motion for leave to amend his complaint to raise these claims, and Mr. Bochese did not appeal from that denial. Accordingly, we are barred from considering these claims, which were never actually raised, in evaluating whether Mr. Bochese has standing.

Mr. Bochese's complaint of July 3, 2003 (the amended complaint) is his operative pleading and, as such, the complaint to which we look in making our standing determination. Imprecise as that document is, it contains no challenge to Town Ordinance 2001-08, to the readopted December 1, 2001, Town Charter, or to any other Town limitation on building height. Our thorough review of the complaint compels us to conclude that it can be fairly read only as challenging the rescission of the Fourth Contract Amendment to the Development Agreement between the Town and PLPI. The complaint repeatedly attributes Mr. Bochese's claimed injuries to the Town's rescission of the

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room for litigants to file purely aspirational pleadings – particularly when masked as actual pleadings – with this Court.

Fourth Contract Amendment. The failure of the Fourth Contract Amendment to the Development Agreement between PLPI and the Town, Mr. Bochese says, prompted PLPI to decide not to close on a land sale deal with Mr. Bochese, depriving him of $950,000 in potential profits.

Specifically, the complaint alleges that, in anticipation of earning $950,000 from selling his land to PLPI for use in their PUD, Mr. Bochese purchased another lot and arranged for the construction of a new home on it. *See* R. 44, 11 ("In reliance on the TOWN's legislative act of re-zoning his property to PUD [in April 2001] and their subsequent representations that the more favorable and flexible PUD zoning regulations and uses would be applied to his property, on August 3, 2001, BOCHESE entered into a $950,000 contract with [PLPI] for the sale of his property. Moreover, in further reliance of [sic] the same, BOCHESE purchased another building lot for the purposes of constructing another residence and expended significant time and money in generating the building plans for the new home site. Additionally, BOCHESE entered into a contract with a builder for the construction of his new home.").

However, Mr. Bochese's plan to sell his land was thwarted when PLPI decided not to buy it, a development Mr. Bochese repeatedly attributes to the "down-zoning" of his land from PUD to T-1 status because the Town rescinded the Fourth Contract Amendment. *See, e.g.*, R. 44, 29 ("[Resolution 2002-10, which approved the rescission of the Fourth Contract Amendment,] unnecessarily and without any logical relationship to its stated purpose or rational justification rezoned BOCHESE's property. . . . [The resolution] down-zoned or spot-zoned BOCHESE's property from PUD to T-1. As such, the TOWN reneged on

the previous legislation and agreement thereby restricting the use of his property, effectively killing BOCHESE's $950,000 deal."); R. 44, 31 ("But for the down zoning-spot zoning of BOCHESE's property, [PLPI] has expressly stated that they would have purchased his property in March 2002 under their contract. Because of the change in zoning, construction consistent with the PUD could not occur due to the TOWN's application of the T1 classification to the rezoned property." (citation omitted)); R. 44, 39(b) ("The TOWN, in February 2002, singled out BOCHESE's property compared to other similarly situated properties that surrounded him and down-zoned or spot zoned his property from PUD to T1 less then [sic] a year after it had been rezoned by the TOWN from T1 to PUD. The zoning change has caused the impairment of his contractual relationship with the PUD developer and has resulted in unreasonable and arbitrary interference with his fundamental possessory interests in his property."); R. 44, 39(e) ("The Town adopted and applied on February 27, 2002, a specific procedure to rezone BOCHESE's property that was intended to and did preclude giving him adequate notice and a meaningful opportunity to be heard.").

Moreover, insofar as Mr. Bochese's complaint identifies with any particularity the basis for his various constitutional claims, it consistently cites the removal of his property from PLPI's PUD, again, pursuant to the Town's rescission of the Fourth Contract Amendment, as the source of his injuries. *See, e.g.*, R. 44, 43(e) (identifying the down-zoning from PUD to T-1 zoning as the *source* of the alleged substantive due process violation); 43(f) (identifying the down-zoning as the *source* of the alleged equal protection violation); 43(g) (identifying the down-zoning as the *source* of the alleged procedural due process violation).

As to damages, Mr. Bochese seeks, in addition to monetary damages "including the diminution in value to his property or the loss of the profit from the $950,000 dollar contract," R. 44, 45, injunctive relief barring the Town "from applying the T1 restrictions that are inconsistent with the PUD to [Bochese's] property as well as [from] changing the zoning classification of his property from PUD to T1 on the TOWN's future land use map." R. 44, 47. This single mention of diminution in property value in Bochese's monetary damages claim is open-ended and could theoretically be construed as a claim for the reduction in value as a result of the application of the 35-foot rule; however, we cannot fairly read it that way for several reasons. For one thing, at no point in the complaint or even subsequent to its filing does Mr. Bochese in any way elaborate on this isolated reference to diminished property value, let alone attribute it to the height restriction. Moreover, Mr. Bochese's complaint strongly says that he believes any economic loss he has suffered resulted from the removal of his property from PLPI's PUD and consequent "down-zoning" to T-1 status. In fact, he repeatedly quantifies his loss as $950,000, precisely the potential value of his contract with PLPI. Finally, his plea for injunctive relief – seeking to bar the Town from down-zoning his land from T-1 to PUD – makes plain that Mr. Bochese is challenging the rescission of the Fourth Contract Amendment, not the Town's 35-foot building height restriction. R. 44, 47.

At no point in the complaint does Mr. Bochese assert that he is challenging or that he has been injured in any way by the Town's April 18, 2001 adoption of Ordinance 2001-08, implementing an across-the-board 35-foot building height limit; by the Town's readoption of its charter,

effective December 1, 2001, to reflect this height restriction; or by *any* action of the Town other than its rescission of the Fourth Contract Amendment on February 27, 2002. Based on the allegations that are contained in Mr. Bochese's complaint, we conclude that all he has challenged here is the Town's rescission of the Fourth Contract Amendment to its Development Agreement with PLPI. We analyze his standing accordingly.

C.

It is by now well established that, "[t]o satisfy the constitutional requirements of standing, a plaintiff must make three showings: First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."' Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Dillard,* 225 F.3d at 1275 (quoting *Defenders of Wildlife,* 504 U.S. at 560-61, 112 S.Ct. 2130 (alterations in original) (internal citations and footnote omitted)); *see also Nat'l Parks Conservation Ass'n,* 324 F.3d at 1241; *Bischoff,* 222 F.3d at 883.

Mr. Bochese has failed in two regards to establish that he has suffered an injury in fact: he has neither shown a legally protected interest of his that the Town has invaded, nor demonstrated an injury that is actual and imminent,

rather than speculative and hypothetical. Because we conclude that Mr. Bochese has failed to establish an injury in fact, we need not and do not consider whether the remaining elements of standing are present.

1.

It is by now abundantly clear that to establish an injury in fact, Mr. Bochese must first demonstrate that the Town has invaded some "legally protected interest" of his. *Dillard,* 225 F.3d at 1275 (quoting *Defenders of Wildlife,* 504 U.S. at 560, 112 S.Ct. 2130). "No legally cognizable injury arises unless an interest is protected by statute or otherwise." *Cox Cable Communications, Inc. v. United States,* 992 F.2d 1178, 1182 (11th Cir.1993). That "interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right." *Vt. Agency of Natural Res.,* 529 U.S. at 772, 120 S.Ct. 1858.

Mr. Bochese claims to have an interest protected by contract. Although he has characterized his claim as arising under § 1983, Mr. Bochese is, in substance, suing to enforce a contract to which he is not a party, namely the Fourth Contract Amendment to the Development Agreement between the Town of Ponce Inlet and PLPI, dated May 21, 2001. As we have explained in some detail, he argues that the Town's wrongful and unlawful rescission of that contract constituted an invasion of his legally protected interest therein, and seeks damages and injunctive relief.

The trouble with this claim is that Mr. Bochese has not established that he has any legally cognizable interest in the subject matter of the Fourth Contract Amendment. The focus of the standing inquiry is "whether the plaintiff

is the proper party to bring this suit." *Raines,* 521 U.S. at 818, 117 S.Ct. 2312. It is undisputed that Mr. Bochese was not a party to the Fourth Contract Amendment, which was entered into and signed by the Town's mayor and PLPI's executive vice-president, Richard Friedman, only. As a non-party, to sue to enforce the contract, Mr. Bochese can only establish standing if he was an intended third-party beneficiary of the rescinded agreement.

The question of whether, for standing purposes, a non-party to a contract has a legally enforceable right therein is a matter of state law. *See, e.g., Miree v. DeKalb County,* 433 U.S. 25, 29-33, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977) (holding that, even when the United States was a party to the contracts at issue, "whether petitioners as third-party beneficiaries of the contracts have standing to sue" was a question of state law, not of federal common law); *Castro Convertible Corp. v. Castro,* 596 F.2d 123, 124 (5th Cir.1979) (observing that whether "a third-party beneficiary contract is a real party in interest, who, like the ultimate beneficiary, has standing to maintain a suit for breach of contract" is a "state contract law question"); *see also Perry v. Sindermann,* 408 U.S. 593, 602 n. 7, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (observing that the question of whether an employment contract endows a plaintiff with a legally enforceable property right is properly answered by reference to state contract law); *Osman v. Hialeah Hous. Auth.,* 785 F.2d 1550, 1550 (11th Cir.1986) (observing that whether a plaintiff has a constitutionally protected property interest in an employment contract is a question of state law).

Applying the law of Florida, we conclude that Mr. Bochese was not an intended beneficiary of the Fourth

Contract Amendment, and therefore has no legal right to challenge its rescission.

"Florida courts have recognized three types of third party beneficiaries to a contract: (1) donee beneficiaries; (2) creditor beneficiaries; and (3) incidental beneficiaries." *Int'l Erectors, Inc. v. Wilhoit Steel Erectors & Rental Serv.*, 400 F.2d 465, 471 (5th Cir.1968) (citation and internal quotation marks omitted). The key distinction is that the first two categories are classes of "intended" beneficiaries, who have a right to sue for enforcement of the contract, whereas the third category, "third party beneficiaries recognized as incidental beneficiaries [,] have no enforceable rights under a contract." *Id.* (citation and internal quotation marks omitted). The *intent* of the parties is the key to determining whether a third party is an intended (*i.e.*, donee or creditor) or only an incidental beneficiary. *See, e.g., Marianna Lime Prods. Co. v. McKay,* 109 Fla. 275, 147 So. 264, 265 (1933) ("[T]he test is[] not that the promisee is liable to the third person, or that there is some privity between them or that some consideration moved from the third person, but that the parties to the contract intended that a third person should be benefitted by the contract.").

Under Florida law, a third party is an intended beneficiary of a contract between two other parties only if a direct and primary object of the contracting parties was to confer a benefit on the third party. If the contracting parties had no such purpose in mind, any benefit from the contract reaped by the third party is merely "incidental," and the third party has no legally enforceable right in the subject matter of the contract. *See, e.g., Thompson v. Commercial Union Ins. Co. of N.Y.*, 250 So.2d 259, 262 (Fla.1971) ("Essential to the right of a third party beneficiary of a contract to maintain an action for its breach is

the clear intent and purpose of the contract to directly and substantially benefit the third party."); *Vencor Hosps. v. Blue Cross Blue Shield of R.I.*, 169 F.3d 677, 680 (11th Cir.1999) ("A party has a cause of action as a third-party beneficiary to a contract if the contracting parties express an intent primarily and directly to benefit that third party (or a class of persons to which that third party belongs)."); *Blu-J, Inc. v. Kemper C.P.A. Group*, 916 F.2d 637, 640 (11th Cir.1990) ("In order for one to qualify as a third party beneficiary under a contract, it must be shown that the intent and purpose of the contracting parties was to confer a direct and substantial benefit upon the third party. In the absence of a clear intent to benefit the third person, he cannot sue on the contract. Where the contract is designed solely for the benefit of the formal parties thereto, a third person cannot maintain an action thereon, even though such third person might derive some incidental or consequential benefit from its enforcement." (quoting *Florida ex rel. Westinghouse Elec. Supply Co. v. Wesley Constr. Co.*, 316 F.Supp. 490, 495 (S.D.Fla.1970), *aff'd*, 453 F.2d 1366 (5th Cir.1972) (citing *Am. Sur. Co. of New York v. Smith*, 100 Fla. 1012, 130 So. 440 (1930)))); *Int'l Erectors*, 400 F.2d at 472 ("The Florida courts require that there must have been an intent to benefit the third party at the time the promisor and promisee entered into the contract in order for the third party to be classified as either a donee or a creditor beneficiary. If no such intention to benefit is found in the contract, the third party is an incidental beneficiary and has no rights enforceable against the promisor under the contract." (citations omitted)).

Accordingly, the question in this case is whether PLPI and the Town entered into the Fourth Contract Amendment for the direct and substantial purpose of conferring a benefit on Mr. Bochese. The Florida Supreme Court has explained that "[t]he question whether a contract was intended for the benefit of a third person is generally regarded as one of construction of the contract. The intention of the parties in this respect is determined by the terms of the contract as a whole, construed in the light of the circumstances under which it was made and the apparent purpose that the parties are trying to accomplish." *A.R. Moyer, Inc. v. Graham,* 285 So.2d 397, 402 (Fla.1973) (quoting 17 *Am.Jur 2d, Contracts* § 304 (1964)). The contracting parties' intent to benefit the third party must be *specific* and must be *clearly expressed* in the contract in order to endow the third party beneficiary with a legally enforceable right. *See, e.g., Am. Sur. Co.,* 130 So. at 441 ("Where, therefore, it is manifest from the nature or terms of a contract that the formal parties thereto intended its provisions to be for the benefit of a third party, as well as for the benefit of the formal parties themselves, the benefit to such third party being the direct and primary object of the contract, or amongst such objects, such third party may maintain an action on the contract even though he be a stranger to the consideration."); *Morgan Stanley DW, Inc. v. Halliday,* 873 So.2d 400, 403 (Fla. 4th DCA 2004) ("A non-party is the specifically intended beneficiary only if the contract clearly expresses an intent to primarily and directly benefit the third party or a class of persons to which that party belongs. To find the requisite intent, it must be established that the parties to the contract actually and expressly intended to benefit the third party; it is not sufficient to show only that one of the contracting parties unilaterally intended some benefit to

the third party." (citations omitted)); *Int'l Erectors,* 400 F.2d at 472 ("[W]here the nature or terms of a contract reveal the intention of the formal parties thereto that its provisions be not merely for their own benefit but also for the benefit of a third party, the benefit to that third party being one of the direct and primary objects of the contract, such a third party action may be maintained.").

The mere fact that Mr. Bochese's land was incorporated into PLPI's PUD pursuant to the Fourth Contract Amendment, without any expression of an intent to confer a benefit on Mr. Bochese, is wholly insufficient to establish that he was an intended beneficiary of the agreement.[6] Nothing in the record suggests that PLPI was motivated by anything other than its own financial gain in contracting with the Town or that the Town had any desire to reach an arrangement beneficial to Mr. Bochese. In fact, the Fourth Contract Amendment, as well as the original Development Agreement governing the PUD, make clear that the Town and PLPI are the only parties with any degree of control over the PUD. The PUD zoning, even of Mr. Bochese's lot was granted specifically *to PLPI. See* R. 93, Ex. 37, 12 (referring to "the Developer's vested rights to construct seventy foot (70') buildings on [the PUD] lots").

[6] Indeed, we have some doubt as to whether the incorporation of Mr. Bochese's land into the PUD was even valid in the first place. The Town Land Development Code makes clear that all land within a PUD must be under unified ownership. The record reflects that PLPI secured authorization for inclusion of the Bochese lot in its PUD by inaccurately representing that it owned the plot. Accordingly, Mr. Bochese's land appears never to have been validly integrated into the PUD at all, separately defeating his claimed interest in the subject matter of the Fourth Contract Amendment. In fact, this was one of the Town's stated reasons for rescinding the Fourth Contract Amendment.

Moreover, the Fourth Contract Amendment contains not a single reference to Mr. Bochese, nor does it even mention with particularity his plot of land. The only allusion thereto is the provision that "[t]he four lots north of the Beach Club now described on Exhibit 'E-7-00' zoned 'T-1' Tourist Accommodations" – one of which plots is presumably Mr. Bochese's – "will be rezoned to Planned Unit Development (PUD) with the current subdivision lot lines being vacated." R. 93, Ex. 37, 12.

In the absence of any specific mention of Mr. Bochese in the contract, it would be extraordinarily difficult for him to establish that under Florida law he was an *intended* beneficiary, since "[a]n intent to benefit a third party which must be inferred from contradicted circumstantial evidence cannot be characterized as 'apparent,' 'direct,' or 'primary.'" *Hewko v. Genovese,* 739 So.2d 1189, 1192 (Fla. 4th DCA 1999). In this case, there is simply *no* evidence – textual, circumstantial, extrinsic, or otherwise – that even one of the contracting parties (let alone both PLPI and the Town) intended to confer a benefit on Mr. Bochese. Thus, it cannot be said that the contracting parties clearly expressed a direct or primary intent to benefit Mr. Bochese.

Because Mr. Bochese was not an intended beneficiary of the Fourth Contract Amendment between the Town and PLPI, he had no "legally cognizable interest" in that agreement and therefore lacks standing to challenge its rescission. Again, it is well settled that a "plaintiff generally must assert his *own* legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499, 95 S.Ct. 2197 (emphasis added); *Miccosukee,* 226 F.3d at 1230 ("Absent exceptional circumstances, a third party does not have

standing to challenge injury to another party."). As the Supreme Court has explained, "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action. . . .'" *Warth*, 422 U.S. at 499, 95 S.Ct. 2197 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973)). Because Mr. Bochese was neither a party to nor an intended beneficiary of the Fourth Contract Amendment, he has not himself suffered a legally cognizable injury as a result of its rescission; thus, even though he might benefit collaterally from the reinstatement of that agreement, he lacks standing to bring this challenge.

2.

Mr. Bochese has also failed to establish that any harm he suffered was "actual or imminent, not 'conjectural' or 'hypothetical,'" *Defenders of Wildlife*, 504 U.S. at 560, 112 S.Ct. 2130, and thus he has failed in a second respect to establish an injury in fact. "[T]o satisfy the injury prong of Article III standing, a plaintiff must 'present "specific, concrete facts" showing that the challenged conduct will result in a "demonstrable, particularized injury" to the plaintiff.'" *Miccosukee*, 226 F.3d at 1229 (quoting *Cone Corp.*, 921 F.2d at 1204 (quoting *Warth*, 422 U.S. at 508, 95 S.Ct. 2197)).

The specific harm Mr. Bochese claims to have suffered as a result of the Town's rescission of the Fourth Contract Amendment is the loss of $950,000 in profits he expected

to earn from selling his land to PLPI. This alleged injury, however, amounts to no more than conjecture. The record clearly reflects that Mr. Bochese's realization of any profit was highly uncertain, since PLPI was under no obligation to purchase his land. The purchase agreement between Mr. Bochese and PLPI in fact amounted only to a sort of option agreement, giving PLPI substantial discretion not to purchase the Bochese lot. An addendum to the agreement provided that purchase was "subject to [PLPI] obtaining the necessary approvals from the Town of Ponce Inlet, Florida for the construction of a 70 foot high condominium in a manner and design acceptable to [PLPI] at [PLPI's] sole discretion," and if PLPI did not obtain such approvals by the scheduled closing date, it would "have the option to close pursuant to the terms of the contract or *terminate* this Contract at its sole discretion." R. 93, Ex. 43 (emphasis added). Moreover, the agreement provided that PLPI's prior or simultaneous purchase of the DiFranco lot was "a condition precedent to [PLPI]'s obligation to close" on the Bochese deal. R. 93, Ex. 43.

The $950,000 Mr. Bochese hoped to earn from selling his land to PLPI was aspirational. Quite simply, he had no way of knowing, let alone proving, (1) whether the Town would approve the construction of a condominium complex at all; (2) if the Town approved any such construction, whether the Town would allow the complex to reach a height of 70 feet; (3) whether the approval would come in a "manner" acceptable to PLPI, at PLPI's "sole discretion"; (4) whether the approved "design" would be acceptable to PLPI, at PLPI's "sole discretion"; (5) whether the necessary approvals, if obtained at all, would come by the scheduled closing date (and, if not, whether PLPI would elect to terminate or to close on the land sale); (6) whether

PLPI would decide to purchase the DiFranco lot; and (7) whether the DiFrancos would decide to sell their lot to PLPI. Moreover, whether these conditions would ever be satisfied was utterly dependent on the discretion of the Town, PLPI, and the DiFrancos. Mr. Bochese had no way of compelling the DiFrancos to sell their land, of compelling the Town to grant PLPI the requisite approvals or, if those were forthcoming, of compelling PLPI to exercise its "sole discretion" to close on the deal with him. The discretion reserved to PLPI under its purchase agreement with Mr. Bochese was simply so broad as to render PLPI's eventual purchase of the Bochese lot no more than a wholly uncertain possibility.

A series of substantial variables, over which Mr. Bochese himself had utterly no control, stood between Mr. Bochese and the $950,000 he hoped to earn. Mr. Bochese's alleged "loss" of $950,000 therefore does not rise to the level of certainty required to establish an injury in fact. We simply cannot conclude that the loss of a hypothetical and uncertain *prospect* of earning a sum of money amounts to an "actual" or "imminent" injury. Thus, Mr. Bochese has demonstrated no injury adequate to establish standing to challenge the Town's rescission of the Fourth Contract Amendment.

Because Mr. Bochese has demonstrated neither a legally protected interest nor an actual or imminent injury, he has failed to establish an injury in fact, and is therefore without constitutional standing.

III.

Measuring Mr. Bochese's standing, as we must, against the claims he actually raised in his complaint, we

conclude that he is without standing to bring this suit, and we are without the judicial power to entertain it. Mr. Bochese's complaint challenged only the rescission of the Fourth Contract Amendment between the Town and PLPI, which caused him no injury in fact. Therefore, we have no jurisdiction, nor did the district court, to examine the merits of his claims. Insofar as the district court entered summary judgement for lack of standing, we AFFIRM on that basis.

AFFIRMED.

EDMONDSON, Chief Judge, concurs in the result.

United States Court of Appeals
For the Eleventh Circuit

No. 04-11542

District Court Docket No.
02-01253-CV-ORL-28-JGG

ALFRED L. BOCHESE,

Plaintiff-Appellant,

versus

TOWN OF PONCE INLET, a municipal corporation organized under the laws of the State of Florida,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(Filed Apr. 7, 2005)

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: April 7, 2005
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ALFRED L. BOCHESE,

Plaintiff,

-vs-

Case No. 6:02-cv-1253-Orl-28JGG

TOWN OF PONCE INLET,

Defendant.

ORDER

(Filed Mar. 23, 2004)

Plaintiff Alfred L. Bochese ("Mr. Bochese") brings the instant action under 42 U.S.C. § 1983 against Defendant Town of Ponce Inlet ("the Town") alleging that the Town deprived him of his rights under the First Amendment, Fourteenth Amendment, and Article I, Section 10 of the United States Constitution. Mr. Bochese also alleges that the Town was negligent in its supervision and retention of the Town Attorney under Florida common law. Mr. Bochese's underlying complaint is that the Town passed an ordinance revoking his property's development zoning classification, thereby frustrating the fulfillment of his contingent contract with a developer, in retaliation for his whistleblowing activities against the Town and the Town Attorney.

This cause is before the Court on the Town's Motion for Summary Judgment (Doc. 88) and Mr. Bochese's Opposition (Doc. 110). The Town argues that it is entitled to judgment as a matter of law on all of Mr. Bochese's claims. Having considered the parties' submissions, the

record in this matter, and the relevant law, the Court concludes that the Town's motion must be granted.

I. Background[1]

Mr. Bochese has owned and resided in a single-family residence on an oceanfront lot in the Town of Ponce Inlet since at least November 8, 1983. (Doc. 125, at 6). The Town of Ponce Inlet is an incorporated municipality that was formed in 1963. *Town of Ponce Inlet, Fla. v. Ponce Lighthouse Props., Inc.*, No. 2002-30561 CICI, at 2 (Fla. 7th Cir. Ct. 2003). In 1983 the Town Council proposed an amendment to the Town Charter to limit all buildings in the Town to a maximum height of thirty-five feet, and this amendment was approved by a majority of the electors at the November referendum. *Id.* Accordingly, the Town Charter was amended and currently includes the following provision: "Buildings within the Town of Ponce Inlet shall be limited to a maximum height of thirty-five (35) feet." (Town Charter, Ex. 58 to Doc. 93, at Art. VII § 7.02). In 1990 and again in 2001, the Town amended and re-adopted its Charter, leaving the 35-foot building height limitation in place with no exemptions or exceptions. (Doc.

[1] Except where otherwise noted, the Background section of this Order is based upon the stipulated facts in the parties' Joint Pretrial Statement (Doc. 125). As will be discussed *infra*, for purposes of summary judgment the Court must construe all facts and the reasonable inferences from them in the light most favorable to the non-moving party, Mr. Bochese. The historical facts regarding the Town's Charter and Ordinances, which can be found in the Florida Circuit Court's decision in *Town of Ponce Inlet, Fla. v. Ponce Lighthouse Props.. Inc.*, No. 2002-30561 CICI (Fla. 7th Cir. Ct. 2003), are largely undisputed and are set forth here only for general background purposes. The state court's decision can be found in the record as Exhibit 83 to Document 93.

125, at 10). Interestingly, Mr. Bochese was an active member of the Town's Charter Review Committee in 2001. (Doc. 125, at 10).

Shortly after passing the Town Charter Amendment, in May 1984 the Town Council approved Ordinance 84-11, which states that the 35-foot height limitation in the Charter Amendment would not apply to certain properties, including properties zoned T-1 as of November 8, 1983. (Doc. 125, at 7; Ex. 17 to Doc. 93). Two years later, in July 1986, the Town entered into a Development Agreement with the predecessors of Ponce Lighthouse Properties, Inc. ("PLPI"). (Doc. 125, at 7; Ex. 19 to Doc. 93). The Agreement set out the rules, criteria, and details for the development of a Planned Unit Development ("PUD") project. (Doc. 125, at 7; Ex. 19 to Doc. 93). The Town Council Ordinance approving the Development Agreement with PLPI stated that "the amendments to the Town's Charter restricting the height of buildings constructed within the municipal limits to thirty-five feet (35') do not apply to the [PUD]." *Ponce Lighthouse,* No. 2002-30561 CICI, at 4. The Agreement specified that the oceanfront section of the PUD would have a maximum building height of thirty-five feet, while the rest of the property would have a maximum building height of eighty-five feet. *Id.* at 5.

In February 2001 the executive vice president of PLPI, Richard Friedman, submitted a Development Review Application to the Town. (Doc. 125, at 7; Ex. 34 to Doc. 93). This application sought to include four contiguous 100-foot oceanfront lots in the existing PUD area by changing their zoning classification from T-1 to PUD. (Doc. 125, at 7). Of the four lots, two were vacant lots owned by PLPI; one was a residential lot owned by Mr. Michael DiFranco ("Mr. DiFranco"); and one was a residential lot

owned by Mr. Bochese. (Doc. 125, at 7). The Town's Land Development Code states that at the time of an application related to a PUD, the applicant must have unified ownership over the entire area within the PUD and that unified ownership has to be maintained until after the recording of the overall development plan. (Ex. 22 to Doc. 93). *Ponce Lighthouse,* No. 2002-30561 CICI, at 6. Unified ownership means "under the ownership of one person, whether by deed, agreement for deed[,] or contract for purchase." (Ex. 22 to Doc. 93). In its application to the Town, PLPI represented that "[t]he lots have either been purchased or [are] under contract to be purchased by [PLPI]." (Doc. 125, at 8). Contrary to this assertion, however, PLPI and the owners had only signed letters of intent – titled "Proposal of Acquisition" – at that time. (Ex. 1 to Doc. 112).

On April 18, 2001, the Town Council adopted Ordinance 2001-08, which repealed Ordinance 84-11 (the ordinance providing an exception to the 35-foot limitation in the Charter for property zoned T-1 as of November 8, 1983). (Doc. 125, at 11; Ex. 38 to Doc. 93). Ordinance 2001-08 also amended the Land Use and Development Code to eliminate all exceptions to the 35-foot building height restriction. (Doc. 125, at 11; Ex. 38 to Doc. 93). Mr. Bochese was at the Town Council meeting on April 18, 2001 when this ordinance was adopted. (Doc. 125, at 8, 10).

The next month, on May 21, 2001, the Town Council voted to execute the Fourth Amendment to the Development Agreement ("fourth contract amendment"), which provided for the inclusion of the four additional oceanfront properties – Mr. Bochese's lot, Mr. DiFranco's lot, and PLPI's two vacant lots – into PLPI's PUD. (Doc. 125, at 8, 12; Ex. 37 to Doc. 93). Up until that time Mr. Bochese's

property had been zoned T-1, but the fourth contract amendment changed its zoning to PUD. (Doc. 125, at 6). The fourth contract amendment also stated that 400 feet of the oceanfront PUD property could be developed with buildings up to seventy feet in height and 300 feet of the oceanfront could be developed with buildings up to thirty-five feet in height. (Doc. 125, at 8).

Two months later, on August 3, 2001, PLPI executed Purchase and Sale Agreements for both the Bochese and DiFranco properties. (Doc. 125, at 8; Exs. 43 & 44 to Doc. 93). The Agreement between PLPI and Mr. Bochese contained two addenda. Addendum 1 stated:

> The contract is subject to [PLPI] obtaining the necessary approvals from the Town of Ponce Inlet, Florida for the construction of a 70 foot high condominium in a manner and design acceptable to [PLPI] at [PLPI's] sole discretion. In the event [PLPI] has not received said approvals by the closing date, [PLPI] shall have the option to close pursuant to the terms of the contract or terminate this Contract at its sole discretion.

(Doc. 125, at 8-9; Ex. 43 to Doc. 93). The contract's closing date was December 1, 2001. (Doc. 125, at 9). Apparently convinced that PLPI would eventually purchase his property, Mr. Bochese decided to move. Within six months following the execution of his contract with PLPI, Mr. Bochese purchased real estate, developed building plans, and hired a builder to construct a new home. (Am. Compl., Doc. 44 ¶ 11).

In early November 2001, PLPI asked Mr. Bochese and Mr. DiFranco for an extension to their purchase agreements. (Doc. 125, at 9). Mr. Bochese agreed, and he and PLPI executed Addendum 2 to the Purchase Agreement,

which extended the closing date until March 1, 2002. (Doc. 125, at 9; Ex. 43 to Doc. 93). Addendum 2 contained the same condition precedent quoted above – that the sale was conditional upon PLPI obtaining approval from the Town for a seventy-foot condominium "in a manner and design acceptable to [PLPI] at [PLPI's] sole discretion." (Doc. 125, at 9; Ex. 43 to Doc. 93). Mr. DiFranco rejected the extension, and his purchase agreement expired on December 1, 2001. (Doc. 125, at 9). Once Mr. DiFranco's agreement expired, there was no longer "unified ownership" within the PUD as required by the Town's Land Development Code. (Ex. 22 to Doc. 93).

After his purchase agreement had expired, on December 31, 2001, Mr. DiFranco informed the Town that PLPI did not own or have a contract to purchase his property – which was part of the PUD under the fourth contract amendment – and asked the Town to repeal the zoning and the fourth contract amendment. (Doc. 125, at 9; Ex. 61 to Doc. 93). The Town Council held a meeting to address the problem on February 27, 2002. The Town published a notice of this meeting in the local newspaper. (Doc. 125, at 9). PLPI representatives were present at the meeting and addressed the Council regarding the development of their project. (Doc. 125, at 9). Mr. Bochese was also present and stated his objection to removing the Bochese property from the PUD. (Doc. 125, at 9).

At the February 27, 2002 meeting, the Town Council adopted Resolution 2002-10 and the Fifth Amendment to the Development Agreement ("fifth contract amendment"), which rescinded the fourth contract amendment. (Doc. 125, at 12). The fifth contract amendment removed the four beachfront lots from the PUD, thus returning Mr. Bochese's property to its prior T-1 zoning classification.

(Doc. 125, at 13). In Resolution 2002-10, which authorized the rescission of the fourth contract amendment and the enactment of the fifth contract amendment, the Council listed its grounds for rescission as follows:

> SECTION 2: GROUNDS FOR RESCISSION:
>
> The following facts have been shown to have existed prior to the execution of the [fourth contract amendment] which requires its rescission:
>
> A. [PLPI] represented to the TOWN that it owned or controlled all of the properties incorporated into the [fourth contract amendment].
>
> B. At the time this representation was made, the statement was false to the extent that it did not have Mr. and Mrs. DiFranco's property under contract.
>
> C. An agreement was entered into between Mr. DiFranco and [PLPI] for the purchase of said property which failed to include Mrs. DiFranco as a party to the agreement.
>
> D. [PLPI] had no valid contract at any point for the purchase of said property in the absence of its execution by Mrs. DiFranco. No oral contract for the sale of the property was permitted as it would violate the Statute of Frauds.
>
> E. The DiFranco agreement expired on December 1, 2001, leaving [PLPI] with no legal entitlement to purchase the subject property.
>
> F. Mr. and Mrs. DiFranco have stated that they do not wish to sell their property to [PLPI] and have demanded in writing that their property be removed from the PUD and restored to the T-1 zoning classification.

> G. The subject property is presently contained within the [PLPI] PUD.

(Ex. 75 to Doc. 93, § 2). Mr. Bochese agrees that the statements contained in paragraphs A, E, F, and G above are true statements of fact. (Joint Pretrial Statement, Doc. 125, at 13).

In light of increasing concern that allowing PLPI to construct buildings over thirty-five feet would contradict the Town Charter, the Town filed a declaratory action against PLPI regarding the Charter's 35-foot height limit in Florida Circuit Court in March 2002. *Town of Ponce Inlet, Fla. v. Ponce Lighthouse Props., Inc.*, No. 2002-30561 CICI, at 1 (Fla. 7th Cir. Ct. 2003). PLPI did not close on Mr. Bochese's property or seek an extension before the purchase agreement expired on March 1, 2002. (Doc. 125, at 12). PLPI later stated that the Bochese contract was not closed because the Bochese property was rezoned out of the PUD and because the Town sought a declaratory judgment enforcing the 35-foot height limitation. (Ex. 4 to Doc. 112).

According to Mr. Bochese, the Town rezoned his property through the rescission of the fourth contract amendment in retaliation for his whistleblowing activities against the Town and the Town Attorney, Ted Doran ("Mr. Doran"). Mr. Bochese's alleged whistleblowing centered around the Federal Emergency Management Agency ("FEMA") regulations that govern the Town's participation in the National Flood Insurance Program. As part of this Program, the Town could obtain flood subsidy discounts for Town residents by enforcing more stringent ordinance requirements designed to reduce flood risks. (Doc. 125, at 6). To remain eligible for the discounts, the Town was

required to certify annually to FEMA that it was enforcing those ordinances. (Doc. 125, at 6). According to Mr. Bochese, the Town was falsely certifying that it was in compliance.

Mr. Bochese was also a whistleblower with regard to Mr. Doran's alleged conflict of interest concerning the Town's FEMA compliance. On April 18, 2001, Mr. Bochese complained at a Town Council meeting that Mr. Doran's legal fees had greatly exceeded the amounts that had been budgeted and that the Town was neglecting its oversight duties. (Ex. 17 to Doc. 112). On July 4, 2001 (approximately two weeks after the Town Council adopted the fourth contract amendment), Mr. Bochese filed a code enforcement complaint with the Town Council. This Complaint claimed that the Inlet Harbor Restaurant, a restaurant partially owned by Mr. Doran, had been reconstructed in violation of the FEMA regulations and the Town's Land Development Code. Two weeks later, at the July 18, 2001 Town Council meeting, counsel for Mr. Bochese made a presentation to the Council arguing that the Town and Mr. Doran had been unlawfully falsifying official public documents to conceal various FEMA code violations involving several properties, including the Inlet Harbor Restaurant. He provided a letter, an affidavit, and other documents as evidence that the Inlet Harbor Restaurant and various other properties were in violation of the FEMA regulations and the Town code.

On September 18, 2001, Mr. Bochese filed a Florida Bar complaint against Mr. Doran alleging that Mr. Doran had a conflict of interest. Mr. Bochese asserted that Mr. Doran's ownership interest in the Inlet Harbor Restaurant and his firm's representation of the restaurant should preclude Mr. Doran from handling the Town's FEMA

matters. After investigation, the Florida Bar determined that there was no probable cause to proceed against Mr. Doran. (Tr. of Pretrial Conf., Doc. 164, at 142:3-143:11).

According to Mr. Bochese, his whistleblowing contributed to a federal investigation, culminating in FEMA demanding that the Inlet Harbor Restaurant be brought into compliance. He also maintains that his whistleblowing drew unwanted publicity upon the Town, including a *Daytona Beach News Journal* newspaper article detailing Mr. Doran and the Town's FEMA problems. Mr. Bochese alleges that the Town signaled its intent to retaliate against him when the Town Council passed Resolution 01-22 on December 12, 2001. (Ex. 36 to Doc. 112). Mr. Bochese has colorfully dubbed this the "Terrorism Resolution" because it refers to the Town and Mr. Doran as being "terrorized" by "a propaganda campaign" and "greedy litigants." (Ex. 36 to Doc. 112). The resolution provides that "the Town Council will no longer sit idly and we are directing the Town Attorney and Town Manager to go on the offensive." (Ex. 36 to Doc. 112).

Mr. Bochese alleges that the Town followed through on its implicit promise to retaliate against whistleblowers when, two and a half months later, it rezoned his property by rescinding the fourth contract amendment. Mr. Bochese contends that the retaliation he suffered is part of a widespread practice whereby high-ranking Town officials retaliate against citizens who speak out against their unlawful conduct. The Town Council allegedly participated in this practice of retaliation by supporting the officials and approving their decisions without meaningful review.

Mr. Bochese filed this § 1983 suit claiming violation of his free speech, due process, equal protection, and freedom

from impairment of contract rights under the Constitution, as well as common law negligent supervision and retention.[2] The Town's motion for summary judgment is now ripe for ruling.

II. Summary Judgment Standards

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "[A]t the summary judgment stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The moving party bears the burden of establishing that no genuine issues of material fact remain. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In ruling on a motion for summary judgment, the Court construes the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255.

If the moving party meets its burden of showing the absence of a genuine material fact, the burden shifts to the

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[2] Mr. Bochese's Amended Complaint contained two additional claims that were disposed of on the Town's motion to dismiss. Mr. Bochese's § 1983 claim alleging that the Town violated his Fourth Amendment rights by illegally seizing his property through the rezoning was dismissed for failure to state a claim. His claim under the Florida Bert J. Harris Act alleging that the Town's actions constituted a taking was dismissed for lack of supplemental jurisdiction. (Doc. 157).

non-moving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). If the non-moving party's evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson,* 477 U.S. at 250-51. "'In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial.' Essentially, the inquiry is 'whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Sawyer v. Southwest Airlines Co.,* 243 F. Supp. 2d 1257, 1262 (D. Kan. 2003) (quoting *Conaway v. Smith,* 853 F. 2d 789, 794 (10th Cir. 1988) & *Anderson,* 477 U.S. at 251-52). Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322.

III. The Merits of The Town's Motion

As an initial matter, the Court notes that Mr. Bochese's Memorandum in Opposition to Summary Judgment (Doc. 110) does not contain a single reference to record evidence demonstrating a genuine issue of material fact. Mr. Bochese's Response in Opposition to the Town's Statement of Material Facts (Doc. 111) does contain references to exhibits submitted in support of his opposition. However, the complete lack of record references in the Memorandum makes it difficult to discern what evidence is being relied upon to establish material issues of fact with regard to each of Mr. Bochese's claims. *See*

Witbeck v. Embry Riddle Aeronautical Univ., Inc., 219 F.R.D. 540, 548 (M.D. Fla. 2004) ("[A] court should not be made to speculate on which facts and evidence the parties rely and for what purpose. . . . ").

As stated above, once the Town met its burden of demonstrating the absence of a genuine issue of material fact, Mr. Bochese then had to respond with "specific facts" showing a genuine issue for trial. Fed. R. Civ. P. 56(e); *see also Comer v. City of Palm Bay, Fla.*, 265 F.3d 1186, 1192 (11th Cir. 2001) (noting that once the movant has met its burden, the non-moving party must "specify facts . . . confirmed by affidavits, depositions, answers to interrogatories, and admissions on file") (internal quotation omitted). Mr. Bochese's failure to provide pinpoint citations for the record references in his Opposition to the Town's Statement of Material Facts is in violation of this Court's Case Management and Scheduling Order. (Doc. 24, at 5 § H) ("Both the movant and the party opposing summary judgment shall provide pinpoint citations to the pages and lines of record supporting each material fact. General references to a deposition are inadequate.") While the Town is arguably entitled to summary judgment solely on the basis of Mr. Bochese's failure to precisely designate specific facts in the record demonstrating a genuine issue of material fact, the Court will nonetheless consider the Town's motion on the merits.

A. Lack of Injury, Causation, or Damages

Mr. Bochese argues that the Town's act of rescinding the fourth contract amendment and rezoning his property cost him the money he would have received from the sale of his property to PLPI, the increased value of his property

under the PUD classification, and the right to construct buildings over thirty-five feet tall on his property. (Doc. 110, at 7). He also claims that the Town is responsible for the time and money he spent purchasing another lot and preparing to build a new home. (Am. Compl., Doc. 44 ¶ 11).

Mr. Bochese, however, has not suffered injury as a result of the Town's action. In essence, what Mr. Bochese suffered was the loss of his anticipated profit from the sale of the property. But, in fact, his prospects for financial gain under his contingent purchase and sale agreement with PLPI were speculative at best. For instance, Mr. Bochese's agreement with PLPI specifically provided that it was "subject to [PLPI] obtaining the necessary approvals from the Town of Ponce Inlet, Florida for the construction of a 70 foot high condominium in a manner and design acceptable to [PLPI] at [PLPI's] sole discretion." While the fourth contract amendment purported to grant both the necessary zoning and building height limitation to PLPI, no rights were conferred upon Mr. Bochese because the purchase and sale agreement still gave PLPI "sole discretion" to decide what approvals were "necessary" and whether the approvals PLPI obtained were "acceptable" in terms of the "manner and design" of construction.

Perhaps more compelling than giving PLPI unfettered discretion as to whether to close the deal is the fact that Mr. Bochese's contract with PLPI contained an unlawful or unobtainable condition precedent. The judgment from the declaratory action filed in state Circuit Court by the Town against PLPI makes it abundantly clear that the Town Council did not have the power to grant PLPI approval to build over thirty-five feet and that any such approval was

unlawful. *Town of Ponce Inlet, Fla. v. Ponce Lighthouse Props., Inc.*, No. 2002-30561 CICI (Fla. 7th Cir. Ct. 2003).[3] In the declaratory action, the Town and PLPI asked the state court to decide "whether [PLPI] has the right to build a structure to a height in excess of thirty-five feet on the . . . property here in dispute, in apparent violation of the [C]harter." *Id.* at 10. Reasoning that a Town Charter is the equivalent of a municipal constitution, the state court stated that the Charter must control the Town's actions unless it conflicts with state or federal law. *Id.* at 11. With respect to Mr. Bochese's property and the other three parcels that the fourth contract amendment had incorporated into the PUD, the state court ruled as follows:

> At the time of repeal of Ordinance 84-11 and the approval of the [fifth contract amendment], no construction had yet begun on the properties zoned T-1 added to the PUD, and regardless of any vested rights of the PUD, no such estoppel rights attended the added property, and the Town is entitled to declaratory relief that the development proposed by [PLPI], east of Atlantic Avenue only, is subject to the 35 foot height limit.

Id. at 12. This declaratory judgment established that the Town could not have granted PLPI the right to build over thirty-five feet without violating the Town Charter.

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[3] This court lacks subject matter jurisdiction to consider Mr. Bochese's arguments that the state court's conclusions were erroneous. *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 482 (1983) ("[A] United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in [the United States Supreme Court].").

If the Town had allowed PLPI to build over thirty-five feet, as Mr. Bochese contends it should have, the results could have been disastrous for PLPI. The Town and PLPI sought the declaratory judgment, at least in part, because a Florida appellate court had recently ruled that a building constructed in violation of the county's comprehensive plan should be completely demolished and removed. *Pinecrest Lakes, Inc. v. Shidel,* 795 So. 2d 191, 207-09 (Fla. 4th DCA 2001). There, the court held that "respect for law, in this case the Comprehensive Plan, trumps any 'inequity' of financial loss arising from demolition." *Id.* at 209. Under this Florida precedent, had PLPI built in violation of the Town Charter, a Town resident perhaps could have successfully sought to have PLPI's building destroyed, regardless of the financial loss this would have caused to PLPI.

Mr. Bochese knew or should have known that obtaining a seventy-foot height limitation would be contrary to the Town's Charter. It is undisputed that Mr. Bochese was an active member of the Town's Charter Review Committee in 2001, the year that the Charter was re-adopted with its across-the-board 35-foot building height restriction. (Joint Pretrial Statement, Doc. 125, at 10). It is also undisputed that Mr. Bochese was present at the Town Council meeting on April 18, 2001 (a month before the fourth contract amendment was passed) when the Council adopted the ordinance eliminating all exceptions to the 35-foot limitation. (Doc. 125, at 8, 10-11). Thus, when Mr. Bochese signed the purchase and sale agreement with PLPI, he knew or should have known that the contract contained a condition precedent that was unlawful under the Town Charter.

Just as Mr. Bochese had no legal right to build to a height of more than thirty-five feet on his property, he had no legal right to the PUD zoning classification. Only PLPI

applied for the PUD zoning classification, and PLPI was required to maintain unified ownership of all property within the PUD. (Ex. 22 to Doc. 93) ("All land within the PUD shall be under the ownership of one person, whether by deed, agreement for deed[,] or contract for purchase[.]"). Accordingly, any right that Mr. Bochese had to the PUD zoning classification was derivative of PLPI's right to that classification. Even if some kind of derivative right had been conferred upon Mr. Bochese as a result of the fourth contract amendment between PLPI and the Town, that derivative right was destroyed when PLPI failed to maintain unified ownership of the property within the PUD by allowing its purchase and sale agreement with Mr. DiFranco to expire. Indeed, the Town's stated reason for rescinding the fourth contract amendment was that PLPI no longer had a contract to buy Mr. DiFranco's property and that property was part of the PUD. (Resolution 2002-10, Ex. 75 to Doc. 93).

In sum, Mr. Bochese has not suffered a legally cognizable injury because he had no legal right to build to a height of more than thirty-five feet on his property or to the PUD zoning classification. Moreover, even if he did suffer some type of injury, the Town's rescission of the fourth contract amendment was not a proximate cause of that injury. Mr. Bochese cannot recover for his dashed hope of substantial financial gain – a hope that was contingent upon PLPI maintaining unified ownership of the PUD properties; upon PLPI deeming the Town's approvals "acceptable" in terms of the "manner and design" of construction; and upon PLPI obtaining a building height limitation that was contrary to the Town Charter. Likewise, the Town cannot be held liable for Mr. Bochese's risky, if not unreasonable, decision to purchase

another home before PLPI had exercised its "sole discretion" to close under the purchase and sale agreement. In the end, any actual or prospective financial loss that Mr. Bochese suffered was not a result of any action on the part of the Town.

Finally, there is no remedy that this Court could provide to Mr. Bochese. The Florida Circuit Court concluded that PLPI's proposed development on Mr. Bochese's property is subject to the Charter's 35-foot height limitation. *Town of Ponce Inlet, Fla. v. Ponce Lighthouse Props., Inc.*, No. 2002-30561 CICI, at 12 (Fla. 7th Cir. Ct. 2003). Therefore, the contingency in Mr. Bochese's purchase agreement with PLPI can never come to pass. Even if the fourth contract amendment had not been rescinded, the provision in the fourth contract amendment allowing PLPI to build over thirty-five feet would still be invalid under the declaratory judgment. Overturning the fifth contract amendment and putting Mr. Bochese's property back into the PUD would still not allow PLPI to build over thirty-five feet. Mr. Bochese has suffered no monetary damages as a result of the Town's rescission of the fourth contract amendment, and equitable remedies would not serve to put him in any better position.

Because Mr. Bochese suffered no injury or damages that were caused by the Town's actions, the Town is entitled to summary judgment on all of Mr. Bochese's claims. Moreover, as will be discussed below, even assuming that Mr. Bochese had established some kind of cognizable injury or loss that resulted from the Town's actions, neither his § 1983 constitutional claims nor his common law negligent retention claim has any merit.

B. Constitutional Claims Under § 1983 in Count I

Mr. Bochese claims that the Town deprived him of his constitutional rights under color of state law in violation of 42 U.S.C. § 1983, which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Mr. Bochese alleges that the Town's rezoning of his property was in retaliation for his whistleblowing in violation of his free speech rights under the First Amendment; that it violated his due process and equal protection rights under the Fourteenth Amendment; and that it impaired his existing contractual relationship with PLPI in violation of the Contract Clause in Article I, Section 10.

1. Municipal Liability

Before addressing Mr. Bochese's specific constitutional claims, it is necessary to discuss the Town's potential liability under § 1983. Local governments may be sued under § 1983, but they cannot be held liable solely on the basis of respondeat superior, meaning an employment or agency relationship alone. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978); *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 403 (1997). To hold the Town liable, Mr. Bochese must show that action pursuant to an official Town policy or custom of some nature caused the alleged

constitutional violation. *Brown*, 520 U.S. at 403; *Matthews v. Columbia County*, 294 F.3d 1294, 1297 (11th Cir.), *reh'g and reh'g en banc denied*, 48 Fed. Appx. 744 (11th Cir. 2002), *cert. denied*, 538 U.S. 945 (2003). A municipal official who has final policymaking authority in a particular area of the municipality's business may by his or her action subject the municipality to § 1983 liability when the challenged action falls within that authority. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-83 (1986). However, only the actions of municipal officers with "final policymaking authority" may subject the Town to § 1983 liability. *Matthews*, 294 F.3d at 1297. This requirement "ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." *Brown*, 520 U.S. at 403-04.

In addition, a local government may be held liable even in the absence of an officially approved policy where the plaintiff can demonstrate a persistent and well-settled custom: "[A]n act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." *Id.* at 404. In sum, to hold the Town liable under § 1983, Mr. Bochese must show either "(1) an action taken or policy made by an official responsible for making final policy in that area of the [Town]'s business; or (2) a practice or custom that is so pervasive, as to be the functional equivalent of a policy adopted by the final policymaker." *Church v. City of Huntsville*, 30 F.3d 1332, 1343 (11th Cir. 1994).

The Town argues that it is entitled to summary judgment on all of Mr. Bochese's § 1983 claims because Mr. Bochese cannot establish either of these grounds for municipal liability. Mr. Bochese responds that the evidence demonstrates both bases.

a. Formal Act or Policy

The alleged unlawfulness of the Town's actions is not apparent from the face of the fifth contract amendment or the ordinance that authorized it. Accordingly, because Mr. Bochese is challenging a facially valid ordinance, he must show that the relevant policymaker(s) acted out of a constitutionally impermissible motive. *Matthews*, 294 F.3d at 1296. Mr. Bochese maintains that when the Council passed the fifth contract amendment it was acting pursuant to the Town's formal policy – or at a minimum its pervasive pattern or custom – of retaliating against its whistleblowing citizens.

As evidentiary support for the existence of a policy or practice of retaliation that allegedly constituted a constitutionally impermissible motive, Mr. Bochese relies almost exclusively on the alleged retaliatory actions and statements of the Town Attorney, Mr. Doran, rather than those of the Town Council members. Essentially, Mr. Bochese contends that Mr. Doran "was delegated unbridled final decision and policy making authority and his decisions were simply 'rubber stamped' and not subject to any meaningful review by the [Town] Council." (Pl.'s Mem. in Opp'n to Summ. J., Doc. 110, at 4-5). The Town maintains that it cannot be held liable for the actions of Mr. Doran because the Town Council is the final policymaker with respect to zoning decisions and there is no evidence that

the Council has delegated its policymaking authority to Mr. Doran or ratified Mr. Doran's actions. The Court agrees.

Whether an official has final policymaking authority that may subject a municipality to § 1983 liability is a question of state law. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988). The Town Charter clearly establishes that the Town Council is the final policymaker with regard to zoning in the Town of Ponce Inlet. It states that the citizens of Ponce Inlet assign "all legislative and policymaking authority to the Town Council," Art. I § 1.01, and that "The Town Council shall cause to be prepared zoning ordinances and maps, regulations, together with amendments thereto," Art. VII, § 7.01. (Town Charter, Ex. 58 to Doc. 93).

Under the delegation doctrine of municipal liability, a local government can be held liable when a final policymaker delegates final policymaking authority to someone else. *Matthews*, 294 F.3d at 1297. For delegation to apply, however, "the delegation must be such that the decision is not subject to review by the policymaking authority." *Id.* In this case, Mr. Bochese has produced no evidence to suggest that the Council delegated its legislative or zoning policymaking authority to Mr. Doran.

Even assuming that Mr. Doran was given policymaking authority, it was not *final* policymaking authority because his decisions still had to be reviewed and approved by the Town Council in order to take effect. The record reveals a process whereby Mr. Doran would submit recommendations and proposed resolutions to the Council, which the Council would then review, discuss, and vote on. For example, at the February 27, 2002 Council meeting

where the fourth contract amendment was rescinded, Mr. Doran stated that he would update the Council on what had happened since the last meeting and then the Council could "take and run it – and run from there." (2/27/02 Tr., Ex. 74 to Doc. 93, at 2:3-6). Mr. Doran stated that he had drafted a proposed resolution for the Council's review and in explaining why he proposed the resolution, Mr. Doran expressed deference to the Council's decision, stating "if the council chose to go in this direction – and again, that's completely in your discretion. There are many options here. You can pick any one you want." (2/27/02 Tr., Ex. 74 to Doc. 93, at 3:22-4:1). While Mr. Bochese has pointed to evidence indicating that Mr. Doran perhaps exercised influence over the Council's decisions, he has not presented evidence that the Council delegated its final policymaking authority to him. Because Mr. Doran did not possess final policymaking power, the delegation doctrine does not render the Town liable for his actions.

Under these circumstances – where the final policymaking authority rests with the Town Council as an entity – the Town can only be held liable if the Council itself acted with an unconstitutional motive. *Matthews*, 294 F.3d at 1297. Moreover, the Eleventh Circuit has held that a plaintiff must demonstrate the requisite unconstitutional motive on the part of a legislative body through evidence that a majority of the legislative body that voted contrary to the plaintiff's interest shared the unconstitutional motive. *See Mason v. Vill. of El Portal*, 240 F.3d 1337, 1340 (11th Cir. 2001) ("[T]here can be no municipal liability unless all three members of the council who voted against reappointing Plaintiff shared the illegal motive."); *see also Matthews*, 294 F.3d at 1297 ("An unconstitutional motive on the part of one member of a three-member majority is

insufficient to impute an unconstitutional motive to the Commission as a whole."); *Church*, 30 F.3d at 1343 ("The plaintiffs may not prevail on the basis of the actions or words of a single councilmember. . . .").

Mr. Bochese has failed to present evidence indicating that any of the five members of the Town Council, who voted unanimously to rescind the fourth contract amendment, acted with an unconstitutional retaliatory motive. The only evidence of an unconstitutional motive that Mr. Bochese can identify is Town Council Resolution 01-22 – what Mr. Bochese refers to as the "Terrorism Resolution." (Ex. 36 to Doc. 112). According to Mr. Bochese, this resolution, which was passed less than three months before the fourth contract amendment was rescinded, is an overt statement that the Town intended to retaliate against whistleblowing citizens.

To the contrary, however, Resolution 01-22 is not evidence of an unconstitutional retaliatory intent. The Resolution is a declaration of support for the Town Attorney, Mr. Doran. (Ex. 36 to Doc. 112). By way of introduction to the declaration of support, the Resolution states that for the previous several years the Town had been plagued by "an onslaught of litigation brought by a handful of greedy litigants" and "propaganda, attempting to smear reputations and utterly ruin this Town." (Ex. 36 to Doc. 112). The Resolution explains that this unwarranted litigation and propaganda has caused "great expense to the taxpayers" and has been detrimental to the "morale of our Town government." (Ex. 36 to Doc. 112). The Resolution states that "the Town Council will pursue these detractors within every means available to [it] under the law" and directs "the Town Attorney and the Town Manager to go on the offensive and help [the Town Council]

bring peace back to this community." (Ex. 36 to Doc. 112). Obviously, a desire to curb frivolous lawsuits and unwarranted smear campaigns – within the limits of the law – is not an unconstitutional motive.

In addition, the record does not reflect any unconstitutional motive on the part of any individual councilmembers. Both the sworn testimony of all five councilmembers and the statements made by the councilmembers on the record at the February 27, 2002 Town Council meeting where the fourth contract amendment was rescinded indicate that all five members were actually motivated by proper municipal concerns. At the February 27 meeting, Councilman Rogerson stated, "I don't believe that this council has the power to allow [PLPI] to [build a] 70 foot height building anywhere in Ponce Inlet." (2/27/02 Tr., Ex. 74 to Doc. 93, at 21:14-18). Vice Mayor Peacock expressed his concern that PLPI would not be willing to build in compliance with the Town's Land Development Code. (2/27/02 Tr., Ex. 74 to Doc. 93, at 23:12-24:16). Councilwoman Andreano stated that she believed that the height restrictions and a land ordinance needed to be looked into further by the Town. She opined that "it would probably be in the best interest of this council to probably rescind the fourth contract amendment like we've – it's been proposed and have [PLPI] go back [to] the very beginning and start over again. . . . " (2/27/02 Tr., Ex. 74 to Doc. 93, at 71:10-19).

In addition to these statements, Councilman Marsh and Mayor Hoak both testified in their depositions that they had no retaliatory motive or intent when they voted to rescind the fourth contract amendment. (Exs. 3 & 9 to Doc. 93). Councilman Marsh, a friend of Mr. Bochese, testified that his vote in favor of rescission had nothing to

do with Mr. Bochese or his Florida Bar complaint against Mr. Doran. (Exs. 3 to Doc. 93). In an affidavit submitted by Mr. Bochese, Mr. Marsh states that he never intended to retaliate against Mr. Bochese for any reason and that he believed at the time of his vote that the Town could not rescind just part of the fourth contract amendment. (Marsh Aff., Ex. 76 to Doc. 112, at 22). Mayor Hoak also testified in his deposition that Mr. Bochese, his criticism of the Town, and his Florida Bar complaint against Mr. Doran had nothing to do with Mr. Hoak's vote to rescind. (Ex. 9 to Doc. 93).

Mr. Bochese argues that the Town can still be held liable even without evidence that the councilmembers acted with unconstitutional intent because the Council ratified the decision of Mr. Doran, which was allegedly made with an unconstitutional retaliatory intent. The doctrine of ratification makes a municipality liable for the decision of a non-final policymaker when the decision is adopted by a final policymaker. *Matthews*, 294 F.3d at 1297. Contrary to Mr. Bochese's assertion, however, for ratification to apply, the final policymaker "must ratify not only the decision itself, but also the unconstitutional basis for it." *Id.* Thus, as the Eleventh Circuit made clear in *Matthews*, Mr. Bochese cannot avoid summary judgment by showing that councilmembers knew about Mr. Doran's (allegedly) retaliatory recommendations or that Mr. Doran influenced their votes. *Id.* at 1298. Instead, Mr. Bochese must show that they ratified the unconstitutional basis for Mr. Doran's decision when they voted in favor of rescinding the fourth contract amendment. *Id.* Mr. Bochese has not presented any evidence indicating that the Council ratified Mr. Doran's allegedly retaliatory basis for his recommendation that the Council rescind the fourth

contract amendment. Thus, the Town is not liable under the doctrine of ratification.

b. Pervasive Practice or Custom

Mr. Bochese alternatively contends that if the Town's pattern of retaliation did not amount to an official policy created by the final policymaker, then the Town's tacit approval or deliberate indifference to the retaliatory actions of the Town's high-ranking officials amounted to a pervasive practice or custom for which the Town may be held liable. Mr. Bochese argues that "the [Town] Council knew of [Mr.] Doran's improper acts and tacitly approved and rubber[-]stamped his retaliatory actions." (Pl.'s Mem. in Opp'n to Summ. J., Doc. 110, at 5).

The Eleventh Circuit has "held that to establish a practice or custom[,] 'it is generally necessary to show a persistent and widespread practice. Moreover, actual or constructive knowledge of such customs must be attributed to the governing body of the municipality. Normally[,] random acts or isolated incidents are insufficient to establish a custom or policy.'" *Church*, 30 F.3d at 1345 (quoting *Depew v. City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986)). As evidence of the Town's alleged practice or custom, Mr. Bochese has proffered the testimony of more than twenty alleged victims of recent retaliation by Town officials. (Ex. 76 to Doc. 112). Mr. Bochese apparently believes that evidence of all manner of allegedly retaliatory acts by several different high-level officials would be sufficient to establish a pattern or custom of retaliation. It is questionable whether dissimilar acts under different circumstances by various municipal officials could ever demonstrate a pattern or custom of

general retaliation by a municipality. However, it is not necessary to conclusively decide the question in this case. Here, the alleged retaliation by high officials other than Mr. Doran is not factually similar enough to constitute part of a pattern or custom of retaliation by the Town. Mr. Bochese concedes that only six of the twenty victims of recent retaliation by Town officials were allegedly retaliated against for complaining about Mr. Doran's misconduct. (Doc. 110, at 4; Doc. 111 at 7). Of these six, Mr. Bochese has produced sworn affidavits from three (Marsh, Albuquerque, and Chester) and the deposition testimony of two (Ryan and Friedman);[4] the testimony from one of the six (Herring) has not been provided.[5] (Exs. 7, 49, 71, & 76 to Doc. 112).

Mr. Marsh was a councilman from 2000-2002 and a friend of Mr. Bochese. In his affidavit, Mr. Marsh states

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[4] Mr. Bochese failed to provide pinpoint citations to the relevant portions of Mr. Ryan's deposition. At the pretrial conference, Mr. Bochese represented that Mr. Ryan was the manager of Mr. Doran's restaurant, the Inlet Harbor. According to Mr. Bochese, Mr. Ryan stated that after he testified against Mr. Doran and the Inlet Harbor Restaurant in a different federal lawsuit, Mr. Doran retaliated by accusing him of perjury and contacting the FBI in an attempt to get him arrested. (Tr. of Pretrial Conf., Doc. 164, at 145:23-147:18).

The sections of Mr. Friedman's deposition provided in Exhibits 49 and 71 are irrelevant to the issue of retaliation, and his sworn testimony was not included in Exhibit 76 as the index indicated it should be. (*See* Doc. 112). Mr. Friedman was the executive vice president of PLPI at all relevant times. According to Mr. Bochese, Mr. Friedman has testified that in July 2001 he stated publicly that he had evidence of Mr. Doran's FEMA misconduct. Seven months later, the fourth contract amendment was rescinded over PLPI's objection. (Tr. of Pretrial Conf., Doc. 164, at 114:6-11).

[5] The Court has been unable to find any mention of Mr. Herring in the documents submitted in support of summary judgment or at the pretrial conference. (*See* Docs. 112 & 164).

that he submitted an affidavit for use in another Town citizen's lawsuit against the Town. That affidavit discussed Mr. Doran's alleged conflict of interest and Inlet Harbor Restaurant's code and FEMA violations. Mr. Doran verbally berated Mr. Marsh for signing the affidavit, calling him names loudly numerous times within earshot of the Town Council meeting in the next room. (Marsh Aff., Ex. 76 to Doc. 112, at 22). In addition, Mr. Doran and three other councilmembers filed an ethics complaint against Mr. Marsh. (Marsh Aff., Ex. 76 to Doc. 112, at 17-20). After being investigated by the ethics commission, Mr. Marsh was cleared of wrongdoing. (Marsh Aff., Ex. 76 to Doc. 112, at 20).

Mr. Albuquerque, a councilman from 1999-2001, states in his affidavit that he filed a report with the Governor detailing the Town's misconduct with regard to the FEMA regulations. (Albuquerque Aff., Ex. 7 to Doc. 112, ¶ 6). Mr. Doran verbally berated him for submitting the report and filed an ethics complaint against him. (Albuquerque Aff., Ex. 7 to Doc. 112, ¶ 16).

Finally, Mr. Chester, an attorney, states that he provided the councilmembers with notice of their potential individual liability for defrauding the federal government under FEMA. He also threatened to file a criminal complaint against the Town and Mr. Doran for failing to release public records to his client. Shortly thereafter, Mr. Doran reported to the Florida Bar and the State Attorney's Office that Mr. Chester had violated the Rules of Professional Conduct. (Chester Aff., Ex. 76 to Doc. 112, at 1-5). According to Mr. Chester, Mr. Doran also widely published the Florida Bar complaint against Mr. Chester, which damaged Mr. Chester's reputation. (Chester Aff., Ex. 76 to Doc. 112, at 5-8).

Regardless of the number of alleged victims of retaliation that Mr. Bochese is able to produce, this type of testimony is not adequate to establish a pattern or custom of retaliation so pervasive and widespread as to have the force of law. While Mr. Bochese has identified evidence tending to show that five other Town residents believed that they were retaliated against by Mr. Doran, he has failed to point to record evidence indicating that the Town Council had actual or constructive knowledge that any of the alleged acts was retaliatory as opposed to proper. None of the affiants states that he complained either formally or informally to the Town councilmembers that the complaints against him by Mr. Doran were completely lacking in merit or had been in retaliation for whistleblowing.

Mr. Bochese relies on the Eleventh Circuit's decision in *Depew v. City of St. Marys*, 787 F.2d 1496 (11th Cir. 1986), a police excessive force case, to support his argument that he has produced a sufficient number of alleged victims of the unconstitutional retaliation for the jury to find that the Town had a pervasive custom. In *Depew* the Eleventh Circuit upheld a jury verdict for the plaintiffs on the basis of only five prior complaints of excessive force. *Id.* at 1498. The court reasoned that the jury could properly infer that the city "had implicitly ratified a custom or policy permitting the police to use excessive force against its citizens," *Id.* at 1501, because the city council members and mayor had knowledge of the prior complaints but failed to take any kind of remedial action, *Id.* at 1498-99.

Mr. Bochese's reliance on *Depew* is misplaced, however, because the police brutality context is fundamentally different from the case at bar. Excessive force by police officers is inherently wrongful and unconstitutional. By contrast, a Town Attorney filing ethics complaints with

various oversight agencies is not inherently wrongful or unconstitutional. Such actions can only be characterized as misconduct that the Council should have remedied if the Council knew that the complaints were totally lacking in merit and were taken in retaliation for the citizens' whistleblowing. There is no evidence showing that members of the Town Council possessed such knowledge.

This case is more closely analogous to *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994). There, a group of homeless persons alleged that the city had an unconstitutional policy or a pervasive custom of arresting, harassing, and removing them from the city. *Id.* at 1342. In analyzing the plaintiffs' pervasive custom argument, the Eleventh Circuit held that the evidence had not established a pervasive practice of violating the plaintiffs' constitutional rights because "[t]he Constitution does not exempt the homeless from the laws against public intoxication, and the enforcement of those laws, when there is probable cause to believe that they have been violated, is not unconstitutional." *Id.* at 1345-46. Applying this principle to the present case, Mr. Bochese has failed to present evidence of a pervasive practice of violating whistleblowers' constitutional rights because the Constitution does not exempt whistleblowers from ethical requirements under laws and regulations, and the filing of ethics complaints against them is not on its face unconstitutional. Even if Mr. Doran's acts did constitute an unconstitutional practice, Mr. Bochese has not established that the Town Council tacitly approved or was deliberately indifferent to Mr. Doran's alleged practice of retaliation; Mr. Bochese has not presented evidence that the councilmembers knew or should have known that the facially lawful acts Mr. Doran took against town citizens were without merit or were taken for an unconstitutional purpose.

Mr. Bochese has failed to identify any evidence demonstrating either an official Town policy or a pervasive practice of unconstitutional retaliation. Thus, the Town may not be held liable for any deprivation that he may have suffered. The Town's motion for summary judgment on Mr. Bochese's § 1983 claims will be granted.

2. First Amendment Retaliation

Mr. Bochese contends that his First Amendment free speech rights were violated when the Town rezoned his property to his detriment in retaliation for his whistleblowing. Specifically, Mr. Bochese filed a building code enforcement complaint claiming that Mr. Doran's restaurant was constructed in violation of FEMA regulations and the Town's Land Development Code; filed a Florida Bar complaint detailing Mr. Doran's conflict of interest with regard to FEMA matters; and spoke out publicly about the Town's violation of FEMA regulations. The parties agree that for Mr. Bochese to establish a First Amendment retaliation claim he must demonstrate 1) that he spoke out on a matter of public concern; 2) that the town officials acted under color of state law through its policymakers or pursuant to its policies and took adverse action against him; and 3) that his speech was a substantial motivating factor in the negative action taken against him. (Joint Pretrial Statement, Doc. 125, at 16) (citing *Bryson v. City of Waycross*, 888 F.2d 1562, 1566 (11th Cir. 1989)).

Once again, Mr. Bochese attempts to use the so-called "Terrorism Resolution" and the acts of Mr. Doran to establish that the Council was substantially motivated by his protected speech. As discussed above, this evidence is insufficient to create a genuine issue of material fact. Mr.

Bochese cannot identify any other evidence establishing that his whistleblowing was a substantial motivating factor in the Town Council's decision to rescind the fourth contract amendment. Thus, there is no genuine issue of material fact, and the Town is entitled to summary judgment on this claim.

3. Due Process

Mr. Bochese contends that the rescission of the fourth contract amendment – which returned his property to its original zoning classification – violated his constitutional rights under the Due Process Clause of the Fourteenth Amendment. The Due Process Clause provides that a state shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Supreme Court has interpreted this clause to provide both substantive and procedural due process protection. *E.g., Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Substantive due process claims challenge the egregious or arbitrary conduct or actions constituting the deprivation of a right, while procedural due process claims contest the inadequacy of the process surrounding the deprivation. *Greenbriar Vill., LLC v. Mountain Brook, City*, 345 F.3d 1258, 1264 (11th Cir.), *reh'g and reh'g en banc denied*, 88 Fed. Appx. 393 (11th Cir. 2003). In considering Mr. Bochese's assertions that both his substantive and procedural due process rights were violated by the Town's rezoning of his property, it is important to bear in mind that federal courts are disinclined to sit as zoning boards of review and that zoning decisions generally will not be found to implicate constitutional guarantees. *Id.* at 1262.

a. Substantive Due Process

A substantive due process claim exists only where a government entity has deprived a person of a fundamental right. *Greenbriar*, 345 F.3d at 1262. Fundamental rights are "implicit in the concept of ordered liberty" and are created by the Constitution. *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (quotation and citation omitted). By contrast, rights created only by state law "constitutionally may be rescinded so long as the elements of procedural – not substantive – due process are observed." *Id.* Substantive due process will only apply to alleged deprivations of property rights in very limited circumstances because property interests are not created by the Constitution; they are created and defined by an independent source such as state law. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Greenbriar*, 345 F.3d at 1262.

The Town argues that summary judgment should be granted in its favor because Mr. Bochese has not been deprived of a fundamental right. Mr. Bochese's Amended Complaint alleges that the Town's rescission of the fourth contract amendment, which returned his property to its original zoning, deprived him of the benefits of his contract with PLPI and interfered with his possessory interest in his real property, namely his ability to build up to a height of seventy feet on his property. (Am. Compl., Doc. 44 ¶¶ 6, 36, 39(b), 40, 43(a)). Assuming for purposes of argument that Mr. Bochese had somehow obtained a right to either the PUD zoning or the seventy-foot height limitation, according to this Circuit's precedent the Town's removal of Mr. Bochese's state-granted and state-defined property right in the zoning and the height limitation cannot, standing alone, establish a substantive due process violation. *See Greenbriar*, 345 F.3d at 1262.

Mr. Bochese also alleges that the Town's actions were unconstitutionally arbitrary and irrational. While substantive due process protects individuals from irrational and arbitrary government action, under the Eleventh Circuit's decision in *McKinney* "non-legislative deprivations of state-created rights, which would include land-use rights, cannot support a substantive due process claim, not even if the plaintiff alleges that the government acted arbitrar[il]y and irrationally." *Greenbriar*, 345 F.3d at 1263 (discussing *McKinney*). The *McKinney* court held that these claims are more properly considered procedural due process claims. *McKinney*, 20 F.3d at 1559.

In an attempt to avoid this rule, which would preclude his substantive due process claim, Mr. Bochese argues that the rezoning of his property was legislative, rather than non-legislative (or executive). Legislative acts are pronouncements of official government policy. *See McKinney*, 20 F.3d at 1557 n.9. They generally apply to a large segment of the population, and enacted laws are a common example. *Id.* By contrast, executive acts usually apply to a limited number of people and arise from ministerial or administrative activities. *Id.* To satisfy substantive due process, legislative acts must be rationally related to legitimate government objectives and not exceed the scope of those objectives. *See Nebbia v. New York*, 291 U.S. 502, 537-39 (1934).

In this case, assuming for purposes of argument that Mr. Bochese had established a state-created property right in the development project and that the rezoning was a legislative rather than an executive act, rescinding the fourth contract amendment was not arbitrary or irrational. As discussed above, the Town Council had legitimate reasons for rescinding the fourth contract amendment. The expiration

of PLPI's purchase agreement with Mr. DiFranco meant that the PUD was no longer under unified ownership as required by the Town's Land Development Code. In addition, the Town was uncertain whether PLPI could build over thirty-five feet in apparent conflict with the Town Charter. There is undisputed evidence of the Town's interest in complying with both the Land Development Code and the height limitation in the Town Charter, and the rescission of the fourth contract amendment rationally relates to those goals.

In sum, Mr. Bochese's substantive due process claim fails because land use rights are state-created rights and are not fundamental rights created by the Constitution. Moreover, even if the rezoning were a legislative deprivation of a state-created right – which must be rationally related and within the scope of legitimate government objectives to satisfy substantive due process – the Town's rescission of the fourth contract amendment was not arbitrary or irrational. The Town's motion for summary judgment on Mr. Bochese's § 1983 substantive due process claim is granted.

b. Procedural Due Process

In considering Mr. Bochese's procedural due process claim, the Court must consider whether Mr. Bochese had a protectable property interest, and, if so, the process that should have been afforded for that protectable right and the process that was actually provided. *Greenbriar*, 345 F.3d at 1264. As a threshold matter, however, "no procedural due process claim exists until a sufficiently certain property right under state law is first shown." *Id.* at 1265. State law creates and defines a plaintiff's property interest, and

whether Florida law has created a property interest is a legal question for the Court to decide. *Key West Harbour Dev. Corp. v. City of Key West, Fla.*, 987 F.2d 723, 727 (11th Cir. 1993).

Mr. Bochese maintains that his rights to build to a height of more than seventy feet and to have the PUD zoning classification were vested under Florida law through the doctrine of equitable estoppel because he detrimentally relied upon the fourth contract amendment. This estoppel-based property right is allegedly derived from (1) the Town's act of including Mr. Bochese's property in the PUD development zone and in granting a height limitation of greater than thirty-five feet; (2) Mr. Bochese's contract with PLPI, which was contingent upon PLPI being able to build a seventy-foot condominium on the premises; and (3) Mr. Bochese's gamble – by purchasing another piece of property and contracting to build a home on it before PLPI had purchased his existing property – that the 35-foot height limitation in the Town Charter would not prevent PLPI from being able to build a seventy-foot condominium.

Under Florida law, a property owner may acquire a property right in a zoning classification based on the doctrine of equitable estoppel. *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1380 (11th Cir. 1994); *City of Hollywood v. Hollywood Beach Hotel Co.*, 283 So. 2d 867, 869 (Fla. 4th DCA 1973), *rev'd in part on other grounds*, 329 So. 2d 10 (Fla. 1976). This doctrine applies where the "owner (1) in good faith (2) upon some actor omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired." *City of Hollywood*, 283

So. 2d at 869. However, "if the landowner has actual or constructive knowledge of an impending zoning change when he obtains his building permit, he has no basis for a claim of equitable estoppel even if he has substantially changed his position or incurred extensive obligations." *Id.* at 870. Where the property owner has such actual or constructive knowledge, he has not relied on the zoning classification in good faith, and therefore the doctrine of equitable estoppel will not apply. *Id.*

As stated previously, Mr. Bochese knew or should have known that the seventy-foot height limitation that the fourth contract amendment purported to give his property was contrary to the Town's Charter. Mr. Bochese admits he was an active member of the Town's Charter Review Committee the year that the Charter was re-adopted with its 35-foot building height restriction. (Joint Pretrial Statement, Doc. 125, at 10). He also admits to being present at the Town Council meeting a month before the fourth contract amendment was passed when the Council adopted the ordinance eliminating all exceptions to the Charter's 35-foot limitation. (Doc. 125, at 8, 10-11).

Furthermore, the uncertainty surrounding a property owner's legal right to build over thirty-five feet at the time in question makes Mr. Bochese's asserted property right unprotectable as a matter of law. In *Greenbriar*, the Eleventh Circuit held, in accord with other circuits, that the uncertainty of an alleged property right renders it unprotectable under established federal due process doctrine. 345 F.3d at 1265-66. This uncertainty may stem from the discretion that the governing body has over whether or not to grant the right or from reasonable disagreement as to the meaning of the applicable law. *Id.* at 1266.

Mr. Bochese could not be certain of selling his property until PLPI determined that it could build a seventy-foot condominium, and PLPI was not certain whether it could build over thirty-five feet in violation of the Town Charter. Reasonable debate over the meaning of the Town Charter's prohibition existed. Indeed, a state declaratory action was needed to determine if PLPI could build over thirty-five feet in light of the Charter's absolute restriction. Mr. Bochese's asserted property right was highly uncertain both under the governing local law and under his contingent contract with PLPI. Thus, it "does not add up to a federally protectable property claim." *Id.* Because Mr. Bochese did not have a sufficiently certain property right under state law, the Court need not consider whether the Town failed to provide him with adequate process. *Id.* at 1265. The Town's motion for summary judgment as to Mr. Bochese's procedural due process claim is granted.

4. Equal Protection

Mr. Bochese also claims that the Town violated his rights under the Equal Protection Clause of the Fourteenth Amendment by treating similarly situated property owners more favorably without any rational basis. The Town argues that it is entitled to summary judgment because Mr. Bochese was treated the same as the other three lot owners whose property was incorporated into the PUD by the fourth contract amendment and because Mr. Bochese has not presented evidence of intentional discrimination. The Court agrees with the Town.

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the

laws." U.S. Const. Amend XIV, § 1. A plaintiff may bring a § 1983 equal protection claim even if he is in a "class of one" by alleging that he has been intentionally treated differently from others who are similarly situated and that no rational basis for the difference in treatment exists. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). However, "[d]ifferent treatment of dissimilarly situated persons does not violate the equal protection clause." *E & T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987).

Mr. Bochese claims that there is evidence in the record that in the past the Town allowed other property owners to construct buildings over thirty-five feet high on their property. Mr. Bochese has failed to show how he is similarly situated to these property owners. To the extent that Mr. Bochese's equal protection claim is predicated on the Town allowing others to build higher than thirty-five feet before Ordinance 2001-08 was passed, it must fail. Ordinance 2001-08 eliminated all exceptions to the 35-foot building height restriction in the Town Charter. (Doc. 125, at 11; Ex. 38 to Doc. 93). Those individuals or entities granted an exception to the 35-foot height limitation before it was clear that such an extension would violate the Town Charter are not similarly situated, and the Town's disparate treatment of them would not violate equal protection. *Cf. E & T Realty*, 830 F.2d at 1112 ("By granting a permit in an uncertain case, a local government is not thereby constitutionally foreclosed from denying it in a 'clear' case or even in an appreciably clearer (but still somewhat unclear) case of unentitlement."). In addition, as the Town points out, all four of the properties put into the PUD zoning classification by the fourth contract amendment were taken out by the fifth contract amendment. The

similarly situated property owners of the four lots – Mr. Bochese, Mr. DiFranco, and PLPI – were treated exactly the same way by the Town.

Even if Mr. Bochese had established that he was treated differently than similarly situated property owners, he has failed to produce evidence establishing an unconstitutional purpose or intent on the part of the Town Council. Because Mr. Bochese is challenging a facially neutral law, evidence of a discriminatory purpose or intent is required. *E & T Realty*, 830 F.2d at 1112. "Mere error or mistake in judgment when applying a facially neutral statute does not violate the equal protection clause. . . . Even arbitrary administration of a statute, without purposeful discrimination, does not violate the equal protection clause." *Id.* at 1114 (citations omitted). For the reasons discussed above, Mr. Bochese has not produced evidence of intentional discrimination on the part of the Town Council in rescinding the fourth contract amendment. The Town is entitled to summary judgment on Mr. Bochese's equal protection claim.

5. Impairment of Contract

Mr. Bochese contends that the Town's passage of the fifth contract amendment, which rescinded the fourth contract amendment, violated his right to freedom from impairment of contract by depriving him of the benefits of his existing contract with PLPI. The Town argues that it is entitled to summary judgment because the purchase contract between PLPI and Mr. Bochese contained an illegal condition precedent and because Mr. Bochese's rights under that agreement were not impaired in any way by the fifth contract amendment.

Article I, § 10 of the United States Constitution prohibits states from passing laws "impairing the Obligation of Contracts." The Contract Clause is violated where (1) there is a contractual relationship; (2) there is a change in law that impairs that contractual relationship; and (3) the impairment is substantial. *Khan v. Gallitano*, 180 F.3d 829, 832 (7th Cir. 1999).

Assuming without deciding that Mr. Bochese had a valid contractual relationship under the terms of the contingent purchase agreement, the rescission of the fourth contract amendment did not impair that relationship. Under the terms of the purchase agreement, Mr. Bochese would be able to sell his property to PLPI if PLPI was successful in "obtaining the necessary approvals from the Town of Ponce Inlet, Florida for the construction of a 70 foot high condominium in a manner and design acceptable to [PLPI] at [PLPI's] sole discretion." (Ex. 43 to Doc. 93). Mr. Bochese still had the same right after the fifth contract amendment was passed. To the extent that the fourth amendment purported to grant PLPI approval to build over thirty-five feet, that approval was invalid under the Town Charter. *Town of Ponce Inlet. Fla. v. Ponce Lighthouse Props., Inc.*, No. 2002-30561 CICI, at 11-12 (Fla. 7th Cir. Ct. 2003). For the reasons discussed above, Mr. Bochese did not suffer any injury as a result of the Town's actions. Accordingly, the Town is entitled to summary judgment on Mr. Bochese's § 1983 Contract Clause claim.

C. Common Law Negligent Retention Claim in Count II

In Count 11 of the Amended Complaint, Mr. Bochese alleges that the Town committed the tort of negligent

retention under Florida common law by negligently retaining the Town Attorney, Mr. Doran, when it had knowledge of his conflict of interest with regard to the Town's compliance with the FEMA regulations and knowledge of his propensity to retaliate against whistleblowing Town citizens.[6] The Town's negligent retention of Mr. Doran allegedly damaged Mr. Bochese because Mr. Doran targeted him for retaliation in response to his whistleblowing and ultimately frustrated his lucrative contract with PLPI by convincing the Town Council to rezone his property. The Town argues that it is entitled to summary judgment because no common law duty of care exists and because even if a duty does exist, sovereign immunity bars any remedy against the Town.[7]

Sovereign immunity bars liability for discretionary acts of government. *Kaisner v. Kolb*, 543 So. 2d 732, 736 (Fla. 1989). According to the Florida Supreme Court, "the term 'discretionary' as used in this context means that the governmental act in question involved an exercise of executive or legislative power such that, for the court to intervene by way of tort law, it inappropriately would entangle itself in fundamental questions of policy and

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[6] Mr. Bochese's claim was originally for negligent supervision and retention. However, at oral argument Mr. Bochese abandoned his claim for negligent supervision, conceding that a municipality cannot be expected to "supervise" its counsel in rendering legal advice. Jr. of Pretrial Conf., Doc. 164, at 128:10-129:1). Thus, the Town's motion for summary judgment as to Mr. Bochese's negligent supervision claim is denied as moot.

[7] The Town also argues that it is entitled to summary judgment on Mr. Bochese's negligent retention claim because Mr. Doran was an independent contractor rather than an employee. However, in light of the Court's conclusion that the Town is entitled to sovereign immunity, this argument need not be reached.

planning." *Id.* at 737. Florida's Fifth District Court of Appeal recently decided that the supervision and retention of high-level government officials is a discretionary act, and the state court's decision mandates summary judgment in favor of the Town. In *Storm v. Town of Ponce Inlet*, the state court addressed the question, "Can a municipality be held liable in tort for negligently hiring, supervising or retaining an employee-agent, after knowing of or being put on full notice of his or her incompetence, malfeasance, and likelihood of injuring individuals in the performance of his or her designated responsibilities?" No. 5D02-3555, 2004 WL 19497, at *2 (Fla. 5th DCA 2004), *reh'g denied* (Mar. 2, 2004). The court answered this question in the negative. *Id.* at *5.

The plaintiff in *Storm* alleged that the Town had negligently supervised its chief building official and negligently retained him even though it had knowledge of his incompetence, misfeasance in supplying false information, and refusal to enforce building codes. *Id.* at *1. The *Storm* court first considered whether the Town had a common law duty to the plaintiff. *Id.* at *3. The court reasoned:

> Persons like Storm who had to deal with the inspector, obtain permits from him, and build in compliance therewith, who were misled as to the required building elevations levels and suffered damage as a consequence, were within the "foreseeable zone of risk" of the inspector's alleged misfeasance, express false assurances, and incompetence.

Id. at *4. Thus, the state court concluded that the Town had a duty because the plaintiff was "in the zone of foreseeable risks created by the employment." *Id.* at *3.

After holding that the Town did have a legal duty to the plaintiff and that the plaintiff had sufficiently stated a claim for negligent retention, the court next considered whether the challenged actions were discretionary ones for which the Town was entitled to sovereign immunity. *Id.* After noting that the Town Council is the "top executive and/or legislative body" for the Town, the court concluded that its employment decisions are clearly discretionary: "The decision of the Town to hire, fire[,] or retain a top executive appointee falls, without question, at the far end of the 'discretionary' basic fundamental decision-making spectrum. It is the most upper level legislative or executive kind of decision." *Id.* at *5. Accordingly, the court stated that for separation-of-powers reasons courts should not review these kinds of decisions, and thus the Town was protected from the plaintiff's negligent supervision and retention claim by the doctrine of sovereign immunity. *Id.*

In the present case, it is unlikely that Mr. Bochese was a foreseeable plaintiff to whom the Town owed a legal duty,[8] but it is unnecessary for the Court to resolve that

[8] Mr. Bochese's claim to have been in the zone of foreseeable risks created by the Town's employment of Mr. Doran is dubious at best. Unlike the plaintiff in *Storm* who had to deal directly with the chief building inspector, Mr. Bochese was not required to work with Mr. Doran to obtain the desired zoning change and building height limitation; rather, PLPI was required to get the necessary changes and approvals from the Town Council itself. In addition, the plaintiff in *Storm* claimed to have relied to his detriment on knowingly false misrepresentations by the chief building inspector. Mr. Bochese asserts that he detrimentally relied on the Council's initial decision to pass the fourth contract amendment. While Mr. Doran may have advised the Council on its actions and given recommendations, as discussed previously the final decisions concerning the zoning and rezoning of Mr. Bochese's property always rested with the Council. Mr. Bochese was

(Continued on following page)

question because the doctrine of sovereign immunity precludes Mr. Bochese's negligent retention claim. Even assuming that the Town did owe Mr. Bochese a duty, under *Storm* the Town's decision to retain its Town Attorney is "necessarily fundamental, and involves the exercise of governmental discretion at the highest level." *Id.* Because the Town is entitled to sovereign immunity for the challenged conduct, the Town's motion for summary judgment 'is granted as to Count II for negligent retention.

III. Conclusion

For the foregoing reasons, Defendant's Motion for Summary Judgment (Doc. 88) is **GRANTED** as to all of Mr. Bochese's remaining claims. All pending motions are **DENIED as moot.** The Clerk is directed to enter judgment for the Defendant and thereafter to close the file.

DONE and **ORDERED** in Orlando, Florida this 23 day of March, 2004.

/s/ John Antoon
JOHN ANTOON II
United States District
Judge

Copies furnished to:
Counsel of Record

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simply not in the foreseeable zone of risk arising from the employment relationship.

The Fourteenth Amendment of the United States Constitution

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article III of the Constitution

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

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42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for

redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rules of Civil Procedure Rule 10c

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

Federal Rules of Civil Procedure Rule 15 b

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the

admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Florida Statutes 163.3194

(1)(a) After a comprehensive plan, or element or portion thereof, has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted.

(b) All land development regulations enacted or amended shall be consistent with the adopted comprehensive plan, or element or portion thereof, and any land development regulations existing at the time of adoption which are not consistent with the adopted comprehensive plan, or element or portion thereof, shall be amended so as to be consistent. If a local government allows an existing land development regulation which is inconsistent with the most recently adopted comprehensive plan, or element or portion thereof, to remain in effect, the local government shall adopt a schedule for bringing the land development regulation into conformity with the provisions of the most recently adopted comprehensive plan, or element or portion thereof. During the interim period when the provisions of the most recently adopted comprehensive plan, or element or portion thereof, and the land development regulations are inconsistent, the provisions of the most recently adopted comprehensive plan, or element or portion thereof, shall govern any action taken in regard to an application for a development order.

(2) After a comprehensive plan for the area, or element or portion thereof, is adopted by the governing body, no land development regulation, land development code, or amendment thereto shall be adopted by the governing body until such regulation, code, or amendment has been referred either to the local planning agency or to a separate land development regulation commission created pursuant to local ordinance, or to both, for review and recommendation as to the relationship of such proposal to the adopted comprehensive plan, or element or portion thereof. Said recommendation shall be made within areasonable [sic] time, but no later than within 2 months after the time of reference. If a recommendation is not made within the time provided, then the governing body may act on the adoption.

(3)(a) A development order or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.

(b) A development approved or undertaken by a local government shall be consistent with the comprehensive plan if the land uses, densities or intensities, capacity or size, timing, and other aspects of the development are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.

(4)(a) A court, in reviewing local governmental action or development regulations under this act, may consider, among other things, the reasonableness of the comprehensive plan, or element or elements thereof, relating to the issue justiciably raised or the appropriateness and completeness of the comprehensive plan, or element or elements thereof, in relation to the governmental action or development regulation under consideration. The court may consider the relationship of the comprehensive plan, or element or elements thereof, to the governmental action taken or the development regulation involved in litigation, but private property shall not be taken without due process of law and the payment of just compensation.

(b) It is the intent of this act that the comprehensive plan set general guidelines and principles concerning its purposes and contents and that this act shall be construed broadly to accomplish its stated purposes and objectives.

(5) The tax-exempt status of lands classified as agricultural under s. 193.461shall not be affected by any comprehensive plan adopted under this act as long as the land meets the criteria set forth in s. 193.461.

(6) If a proposed solid waste management facility is permitted by the Department of Environmental Protection to receive materials from the construction or demolition of a road or other transportation facility, a local government may not deny an application for a development approval for a requested land use that would accommodate such a facility, provided the local government previously approved a land use classification change to a local comprehensive plan or approved a rezoning to a category allowing such land use on the parcel, and the requested land use was disclosed during the previous comprehensive plan or

rezoning hearing as being an express purpose of the land use changes.

Florida Statutes 166.041(3)(c)

c) Ordinances initiated by other than the municipality that change the actual zoning map designation of a parcel or parcels of land shall be enacted pursuant to paragraph (a). Ordinances that change the actual list of permitted, conditional, or prohibited uses within a zoning category, or ordinances initiated by the municipality that change the actual zoning map designation of a parcel or parcels of land shall be enacted pursuant to the following procedure:

1. In cases in which the proposed ordinance changes the actual zoning map designation for a parcel or parcels of land involving less than 10 contiguous acres, the governing body shall direct the clerk of the governing body to notify by mail each real property owner whose land the municipality will redesignate by enactment of the ordinance and whose address is known by reference to the latest ad valorem tax records. The notice shall state the substance of the proposed ordinance as it affects that property owner and shall set a time and place for one or more public hearings on such ordinance. Such notice shall be given at least 30 days prior to the date set for the public hearing, and a copy of the notice shall be kept available for public inspection during the regular business hours of the office of the clerk of the governing body. The governing body shall hold a public hearing on the proposed ordinance and may, upon the conclusion of the hearing, immediately adopt the ordinance.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT COURT OF FLORIDA
ORLANDO DIVISION

CASE NO: 6:02-CV-1253-ORL-28JGG
JUDGE ANTOON

ALFRED L. BOCHESE,

Plaintiff,

vs.

TOWN OF PONCE INLET, a municipal corporation organized under the laws of the State of Florida

Defendant. /

JOINT PRETRIAL STATEMENT

(Filed 12/16/2003)

Plaintiff, Alfred Bochese, and Defendant, The Town of Ponce Inlet, by and through their undersigned counsel and pursuant to local rule 3.06, jointly submit the following Pretrial Stipulation. **The undersigned counsel for the Plaintiff anticipates that the trial in this cause will require 20 days. The undersigned counsel for the Defendant anticipates that the trial in this cause will require 5-7 days**

A. BASIS OF FEDERAL JURISDICTION

This court has jurisdiction of this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343, and over the supplemental state claims pursuant to 28 U.S.C. § 1367.

B. NATURE OF THE ACTION

1. ***Plaintiff's Claim.*** Bochese's civil action is brought in two counts. Count I is brought pursuant to 42 U.S.C.§ 1983 against the Town of Ponce Inlet, Florida. Bochese alleges this cause of action is brought as a result of Theodore Doran's and the Town's

* * *

L. CONCISE STATEMENT OF THOSE FACTS THAT ARE ADMITTED

On May 8, 1984, the Town Council approved Ordinance 84-11, which interpreted that the height restriction of 35 feet contained within the Town Charter, did not apply to certain zone classifications, including the T-1 zone classification (oceanfront properties).

Section 5.5.8 of the Land Use and Development describes the available uses for property located in zoning classification T-1.

Bochese's property, which was zoned T1 as of March 2001.

That Town Ordinance 84-11 sought to provide an exception to the Town Charter's 35 foot height restriction for all properties located within the T-1 zoning classification.

That at the April 18, 2001 Town Council meeting, the Town Council voted to repeal Town Ordinance 84-11 in its entirety and enacted Ordinance 2001-08 which amended the Town's Land Use and Development Code to eliminate all exceptions to the thirty-five (35) foot height restriction.

The Fourth Amendment, in paragraph 12, contained an agreement that 400 feet could be developed with

buildings up to 70 feet in height and 300 feet to be developed with buildings in excess of 35 feet.

That on May 21, 2001, Councilman, Don Hampton voted in favor of approving the Fourth Amendment to the Development Agreement which inserted the Bochese residence within PLPI's PUD.

That on May 21, 2001, Councilman, Elmer Marsh voted in favor of approving the Fourth Amendment to the Development Agreement which inserted the Bochese residence within PLPI's PUD.

The Town rezoned his property to PUD in May of 2001 from TI to PUD.

On February 27th 2002 Councilmember, Elmer Marsh made a motion on behalf of the Town Council to instruct the Town Attorney to file a declaratory action in the Circuit Court in order to determine the legal implications of the approval, and subsequent repeal of Ordinance 84-11 by the Town as it relates to the existence of the Fourth Amendment to the Development Agreement.

That pursuant to Resolution 2002-10 all residential lots formerly included in the PUD under the Fourth Amendment to the Development Agreement were returned to their original T-1 zoning classification.

N. CONCISE STATEMENT OF THOSE ISSUES OF FACT THAT REMAIN TO BE LITIGATED

27. Whether the application of the Town's 35 ft building height regulations and subsequent Town Charter Amendment incorporating these height restrictions to the

T1 and PUD zoning classifications on February 27, 2002 are inconsistent with the Town's 1991 Comprehensive Plan.

47(f). Whether . . . The Town repealed ordinance 84-11 which allowed buildings heights up to 70 ft and adopted building height regulations in violation of State law and the Town's comprehensive plan and applied these invalid regulations to Bochese's property. The Town intentionally singled out Bochese when it prohibited the construction of a building 70ft. in height on Bochese's property. Other property owners similarly situated in the same zoning classification were permitted to build to height of 70ft. Based on the Town's arbitrary and capricious, irrational and bad faith conduct

49. Whether once Doran's and the Town's acts were discovered, Bochese provided written notice and complaint to the Town but no corrective action or acts to mitigate were taken by the Town.

50. Whether any further action by Bochese to mitigate the circumstances created by the Town by obtaining a variance through Doran would be an exercise in futility based on the Town's retaliatory policy. The actions of the Town constitute final municipal action.

54. Whether Doran and the Town of Ponce Inlet, Florida through their actions, inactions and retaliatory policies, practice and custom have purposefully and knowingly subjected Bochese to a deprivation of rights, privileges, and immunities by:

> e). Violating and abridging Bochese's Substantive Due Process right by impairing his vested rights and his right of "ownership" in his property and its attributes such as the right to

use and enjoy his property with out any rational basis. The Town down zoned-spot zoned his property from PUD to T1. The Town adopted and applied to Bochese's property, a T1 zoning classification in violation of state law that also bears no relationship to the public health, safety, morals, or general welfare. The Town completely failed to articulate any reason whatsoever for the down zoning-spot zoning. The Town repealed ordinance 84-11 which allowed buildings heights up to 70 ft and adopted building height regulations in violation of State law and the Town's comprehensive plan and applied these invalid regulations to Bochese's property. Additionally, Bochese relied in good faith upon the Town's previous decision to rezone his property to PUD, and ordinance 84-11. Bochese has made substantial changes in his position and incurred extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights he has acquired based on the Town's arbitrary and capricious, irrational and bad faith conduct. Accordingly, the Town's actions exceeded it's police powers.

f). Violating and abridging Bochese's right under the Equal Protection clause by singling him out for disparate treatment compared to other surrounding property owners similarly situated without any rational basis when the Town rezoned his property. The Town down zoned-spot zoned his property from PUD to T1. Unlike the surrounding properties, the Town adopted and applied to Bochese's property, in violation of state law, a T1 zoning classification that bears no relationship to the public health, safety, morals, or general welfare. The Town completely failed to articulate any rational reason whatsoever

for the down zoning-spot zoning. The Town repealed ordinance 84-11 which allowed buildings heights up to 70 ft adopted building height regulations in violation of State law and the Town's comprehensive plan and applied these invalid regulations to Bochese's property. The Town intentionally singled out Bochese when it prohibited the construction of a building 70ft. in height on Bochese's property. Other property owners similarly situated in the same zoning classification were permitted to build to height of 70ft. Based on the Town's arbitrary and capricious, irrational and bad faith conduct, the Town's actions exceeded it's police powers.

Whether Bochese has suffered special and economic damages specifically including the **diminution in value** to his property or the loss of the profit from the $950,000 dollar contract as a result of the application of these unlawful customs, practices, policies and official acts.

56. Whether Bochese has suffered mental pain, humiliation, loss of enjoyment of life and other damages suffered as a result of these violations. Because of the egregious, willful and outrageous conduct engaged in by the Town pursuant to its the [sic] application of these unlawful customs, practices, policies and official acts.

O. ISSUES OF LAW THAT REMAIN TO BE DETERMINED BY THE COURT

The Town's application of the 35ft. building height restrictions contained in Ordinance 83-012 and its Charter to the PUD and the T1 zoning classifications was clearly inconsistent with the Town's 1990 Comprehensive Plan.

The Town's 1990 Comprehensive Plan protected vested rights involving building heights by expressly permitting a 70 ft. building height in the PUD classification based on the 1986 PUD development agreement and in the T1 classification where properties such as Bochese's were zoned T1 as of November 1983.

Pursuant to Florida Statutes, Ponce Inlet was required to adopt land use regulations consistent with its Comprehensive Plan and eliminate those that were not. See *Franklin County v. S.G.I. Limited*, 728 So.2d 1210 (Fla. 1st DCA 1999).

Section 163.3194 of Florida Statutes, specifies that in the event of any inconsistency between the Comprehensive Plan and the pre-existing zoning, the Plan shall control. This statutory provision also requires that within one year after adoption of the new Plan, the Town shall adopt land use regulations which are consistent with and which implement the new plan. It is the [sic] clear that the meaning of this provision is that compliance of a development with the comprehensive plan is to be determined by reference to "the objectives, policies, land uses, and densities and intensities in the comprehensive plan *Franklin County* at ___

Pursuant to Florida Statutes 163.3194, the Town in 1984 adopted land use regulations consistent with its Comprehensive Plan that allowed 70 ft. building heights for the PUD and T1 zoning classifications. However, the Town's repeal on April 18th 2001 of Ordinance 84-11 which grand-fathered in the 70 ft. building height for the PUD and TI classifications was clearly in violation of state law and the Town's Comprehensive Plan.

Ordinances that substantially affect land use must be enacted under the procedures that govern zoning and rezoning. See *City of Sanibel v. Buntrock*, 409 So. 2d 1073 (Fla. 2nd DCA 1982). Section 166.041(3)(a) states the notice requirements for the adoption of a municipal ordinance.

Ordinances "which rezone specific parcels of private real property or which substantially change permitted use categories in zoning districts" are subject to the more rigid requirements of Section 166.041(3)(c). This case involves the rezoning of *public* real property. Because no notice was given to plaintiff, it is immaterial (and this court need not decide) whether section 166.041(3)(a) or 166.041(3)(c) governs this action. Fla. Stat. (1981). Again, to the extent the Charter's invalid 35 ft height restriction was used as basis to rescind the Fourth Amendment Development Agreement, the TOWN'S action was wholly arbitrary and irrational.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT COURT OF FLORIDA
ORLANDO DIVISION

CASE NO: 6:02-CV-1253-ORL-28JGG
JUDGE ANTOON

ALFRED L. BOCHESE,

Plaintiff,

vs.

TOWN OF PONCE INLET, a municipal, corporation organized under the laws of the State of Florida,

Defendant.
_____/

CIVIL ACTION BY AMENDED VERIFIED COMPLAINT FOR DEPRIVATION OF CIVIL RIGHTS, NEGLIGENT SUPERVISION AND RETENTION AND TAKINGS CLAIM UNDER BERT J. HARRIS DAMAGES AND INJUNCTIVE RELIEF SOUGHT AND DEMAND FOR JURY TRIAL

(Filed July 3, 2003)

The Plaintiff, ALFRED L. BOCHESE, by and through his undersigned counsel, sues the Defendant, THE TOWN OF PONCE INLET for injunctive relief and damages resulting from the Defendant's intentional deprivation of the Plaintiff's constitutionally protected rights. This action is brought pursuant to Title 42 Section 1983 of the Code of Laws of the United States of America.

JURISDICTIONAL BASIS OF THE CLAIMS

1. This 42 U.S.C 1983 action claims violations of the Plaintiff's fundamental

* * *

EXHIBIT B

(App. 102-105)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT COURT OF FLORIDA
ORLANDO DIVISION

CASE NO: 6:02-CV-1253-ORL-28JGG
JUDGE ANTOON

ALFRED L. BOCHESE

Plaintiff

vs.

TOWN OF PONCE INLET,
a municipal corporation
organized under the laws of
the State of Florida

Defendant. /

AFFIDAVIT OF FRED TREADWAY

BEFORE ME, the undersigned authority, personally appeared FRED TREADWAY, who, after being duly sworn, deposed and says:

1. The statements contained in the letter attached as exhibit A are true and correct.

2. This exhibit requires only one correction. The November 17, 2000 date is a typographical error. The correct date is November 17, 2002.

FURTHER AFFIANT SAYETH NAUGHT

/s/ Fred Treadway
FRED TREADWAY

STATE OF FLORIDA
COUNTY OF VOLUSIA

The foregoing instrument was sworn or acknowledged before me this 30th day of April 2003 by FRED TREADWAY who is personally known to me or who has produced _____ as identification and who did/did not take an oath.

[LOGO] Roslynn G. Zani
My Commission DD068252
Expires September 11, 2005

/s/ Roslynn G. Zani
NOTARY PUBLIC
My Commission
Expires:

[LOGO]
HARBOUR VILLAGE

Golf & Yacht Club™

November 17th 2000

Mr. Alfred Bochese
4671 S. Atlantic Avenue
Ponce Inlet, Fla. 32127

Dear Mr. Bochese,

As you are aware our contract is expiring on December 1, 2002. Unfortunately the delays caused by the pending controversy and litigation between the Town of Ponce Inlet and Ponce Inlet Properties Inc. regarding the issues of the 70 ft. building height and the Preston Line will prevent us from closing under our current agreement.

It was a shame that the Town rezoned and your property back to the T1 classification last February. But for that change in the zoning classification we would have closed on the sale of your property back in March under the previous agreement. Until you obtain a rezoning back to the PUD classification we cannot purchase your property. If you do not obtain that rezoning soon, it may be too late all together.

Additionally, we *now* will also have to resolve favorably our current dispute with the Town, which will allow us a 70 ft building height and eliminate the application of the Preston line to our project. We had previously felt that these issues were going to be resolved much more expeditiously and were prepared to close the transaction but for the Towns rezoning of your property. Unfortunately, that's no longer the case.

Because of the change in circumstances we will have to resolve all the above issues before we can renegotiate a new agreement. We are willing to discuss an option agreement.

Sincerely,

/s/ Fred Treadway
Pres.
Fred Treadway

EXHIBIT C

(App. 106-App. 113)

Paul M. Meredith, P.A.
Attorney At Law

[Address Omitted In Printing]

(Filed July 3, 2003)

August 27, 2002

Bernie Murphy, City Manager
Town of Ponce Inlet
4680 South Peninsula Drive
Ponce Inlet, Florida 32126

RE: Alfred and Frances Bochese's Claim for Compensation pursuant to §70.001, *Fla. Stat.*, "Bert J. Harris, Jr., Private Property Rights Protection Act." – Supplemental Notice and Waiver of Sovereign Tort Immunity Notice Pursuant To Fla, Stat. 768.28(6)(a)

Dear Mr. Murphy:

We represent Alfred and Frances Bochese, who are property owners within the town of Ponce Inlet, Florida.

This letter constitutes a claim by our clients for compensation pursuant to §70.001, Fla. Stat., *et seq* "Bert J. Harris, Jr., Private Property Rights Protection Act" and supplements the notice of claim previously served concerning "4671 S. Atlantic Avenue."

Our claim relates to the property on their beachfront, the legal description of which is included in the enclosed appraisal, specifically described as:

CONSISTING OF 12.67' X 327.00' MORE OR LESS

LEGAL DESCRIPTION BEACH ACCESS STRIP (PARCEL 1)

A PORTION OF TRACT 4, THRIFT TRACT SUBDIVISION AS RECORDED IN MAP BOOK 11, PAGE 171, PUBLIC RECORDS OF VOLUSIA COUNTY, FLORIDA AS LIES IN SECTION 19, TOWNSHIP 16 SOUTH, RANGE 34 EAST, VOLUSIA COUNTY, FLORIDA BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS: AS A POINT OF REFERENCE COMMENCE AT THE SOUTHEASTERLY CORNER OF PONCE TERRACE SUBDIVISION AS RECORDED IN MAP BOOK 36, PAGE 38, PUBLIC RECORDS OF VOLUSIA COUNTY, FLORIDA, SAID POINT BEING ON THE WESTERLY RIGHT-OF-WAY OF SOUTH PENINSULA DRIVE (A 100 FOOT RIGHT OF WAY AS NOW LAID OUT AND USED); THENCE NORTH 26 DEGREES 59 MINUTES 24 SECONDS WEST ALONG WESTERLY RIGHT-OF-WAY OF SAID SOUTH PENINSULA DRIVE A DISTANCE OF 250.00 FEET TO A POINT ON THE SOUTH LINE OF PONCE INLET SUBDIVISION AS RECORDED IN MAP BOOK 29, PAGE 80, PUBLIC RECORDS OF VOLUSIA COUNTY, FLORIDA; THENCE NORTH 74 DEGREES 00 MINUTES 32 SECONDS EAST 101.87 FEET TO A POINT ON THE EASTERLY RIGHT-O-WAY OF SAID SOUTH PENINSULA DRIVE; THENCE NORTH 74 DEGREES 00 MINUTES 32 SECONDS EAST 450.01 TO A POINT ON THE WESTERLY RIGHT-OF WAY OF SOUTH ATLANTIC AVENUE (A 100 FOOT RIGHT-OF-WAY AS NOW LAID AND USED), SAID POINT ALSO KNOWN AS THE NORTHEASTERLY CORNER OF PONCE COLONY VILLAS; THENCE NORTH 74 DEGREES 00 MINUTES 32 SECONDS EAST 102.83 FEET TO A POINT ON THE EASTERLY RIGHT-OF-WAY OF SAID SOUTH ATLANTIC AVE, SAID POINT BEING ON A CURVE, CONCAVE EASTERLY, HAVING A RADIUS OF 2496.64 FEET; THENCE SOUTHERLY ALONG THE

ARC OF SAID CURVE TO THE LEFT HAVING A DELTA ANGLE OF 02 DEGREES 05 MINUTES 04 SECONDS, A DISTANCE OF 90.83 FEET, SAID ARC SUBTENDED BY A CHORD WHICH BEARS SOUTH 30 DEGREES 46 MINUTES 32 SECONDS EAST, A DISTANCE OF 90.82 FEET TO THE POINT OF TANGENCY; THENCE SOUTH 31 DEGREES 49 MINUTES 04 SECONDS EAST ALONG THE SAID EASTERLY RIGHT-OF-WAY LINE OF SOUTH ATLANTIC AVENUE, 1093.57 FEET TO THE BEGINNING OF A CURVE, CONCAVE EASTERLY, HAVING A RADIOUS [sic] OF 2496.58 FEET AND A CENTRAL ANGLE OF 14 DEGREES 26 MINUTES 51 SECONDS; THENCE SOUTHERLY ALONG THE ARC OF SAID CURVE TO THE LEFT, A DISTANCE OF 629.53 FEET, SAID ARC SUBTENDED BY A CHORD WHICH BEARS SOUTH 39 DEGREES 02 MINUTES 30 SECONDS EAST, A DISTANCE OF 627.86 FEET TO A POINT OF TANGENCY; THENCE CONTINUE ALONG SAID RIGHT-OF-WAY SOUTH 46 DEGREES 15 MINUTES 55 SECONDS EAST 271.22 FEET TO THE BEGINNING OF A CURVE; CONCAVE WESTERLY, HAVING, A RADIUS OF 2596.61 FEET AND A CENTRAL ANGLE OF 04 DEGREES 08 MINUTES 42 SECONDS; THENCE SOUTHERLY ALONG THE ARC OF SAID CURVE TO THE RIGHT A DISTANCE OF 187.85 FEET, SAID ARC SUBTENDED BY A CHORD WHICH BEARS SOUTH 44 DEGREES 11 MINUTES 34 SECONDS EAST, A DISTANCE OF 187.81 FEET TO THE POINT OF BEGINNING, SAID POINT OF BEGINNING BEING ON THE SOUTH LINE OF A 12 FOOT ACCESS PARCEL TO THE BEACH; SAID POINT OF BEGINNING BEING ON A CURVE, CONCAVE WESTERLY, HAVING A RADIUS OF 2596.61 FEET AND A CENTRAL ANGLE OF 00 DEGREES 18 MINUTES 52 SECONDS; THENCE NORTHERLY

ALONG THE ARC OF SAID CURVE TO THE LEFT, A DISTANCE OF 14.25 FEET; SAID ARC SUBTENDED BY A CHORD WHICH BEARS NORTH 42 DEGREES 16 MINUTES 39 SECONDS WEST, A DISTANCE OF 14.25 FEET; THENCE SOUTH 89 DEGREES 47 MINUTES 35 SECONDS EAST ALONG THE NORTH LINE OF SAID 12 FOOT ACCESS PARCEL, 327 FEET, MORE OR LESS, TO THE MEAN HIGH WATER LINE OF THE ATLANTIC OCEAN BEACH; THENCE SOUTHEASTERLY ALONG THE MEAN HIGH WATER LINE OF THE ATLANTIC OCEAN BEACH, 12.67 FEET, MORE OR LESS, TO A POINT THAT LIES SOUTH 89 DEGREES 47 MINUTES 35 SECONDS EAST FROM THE POINT OF BEGINNING; THENCE NORTH 89 DEGREES 47 MINUTES 35 SECONDS WEST ALONG THE SOUTH LINE OF SAID 12 FOOT ACCESS PARCEL, 324.45 FEET, MORE OR LESS, TO THE POINT OF BEGINNING.

The Town has notified them that their property has been rezoned from P.U.D. to T1 by a vote of the Town council on February 27, 2002. This vote occurred at a special meeting and was brought to fruition without proper notice to my clients or meaningful opportunity to be heard.

By the imposition of these alleged land regulations, the value of the contract previously entered into between our client and Harbour Village/Ponce Inlet Properties, Inc., was destroyed. My clients, as owners, are permanently unable to attain the reasonable investment – backed expectation for the vested use of the real property – and has been denied a vested right to a contemplated specific use of that real property as well as various alternative uses. Moreover, my clients have been singled out compared to others similarly situated based on unconstitutional motives.

Therefore, our client's property is "inordinately burdened" by the actions of the Town of Ponce Inlet as defined by §70.001(2)(3), Fla. Stat.

Ponce Inlet Properties, Inc., had, prior to February 27, 2002, advised the Town of Ponce Inlet that the property described herein was contracted for purchase and part of the PUD that they intended to develop, so that the previously mentioned contract interference as done with full knowledge of its injurious consequences.

The unlawful interference with the Bochese's property was furthered and compounded by the Town's actions against Ponce Inlet Properties, Inc. Those actions included rescinding Ordinance 84-11, rescinding the Fourth Amendment to the Development Agreement and by an unlawful application of Ordinance 91-10. The interrelated acts against Ponce Inlet Properties, Inc. are partly described in that Bert J. Harris Act notice dated September 27, 2001, already served on the Town of Ponce Inlet and incorporated by reference, previously attached to the primary notice of claim by Bochese.

As a result of the Town's actions, it's estimated that the property owner has lost fair market value in the real property described herein in excess of $63,000.00. An appraisal to support the claim has been completed and is hereby provided to the Town with this notice. You should note that a much higher value might be later assigned to this property in that one comparable sale price would indicate a value of over 10,000 per foot or a total value of over $120,000.

By the filing of this claim, pursuant to §70.001, Fla. Stat., Alfred and Frances Bochese in no way waives any claims or causes of action they may have pursuant to 42 USC

1983 *et seq* and other claims pursuant to the Florida and Federal Constitutions.

By adding a waiver of sovereign tort immunity notice to this supplemental notice under the "Bert J. Harris Act" it is the claimant's intent to notice the Town of Ponce Inlet of their intention file tort claims against the town for tortious interference of contract, negligent supervision of The Doran law firm and other appropriate state claims which redress the harm related to this 12 foot strip of land and to the larger parcel of land located at 4671 S. Atlantic Ave. It is the claimant's position that the motives which resulted in the tortious conduct by the town was in part brought about to retaliate against him for speaking out against the Doran Firm and speaking out against the town's conduct.

The personal information required Fla. Stat. 768.28(6)(c) is as follows: the claimant was born in Newark, New Jersey on Jan. 2 1929. Mr. Bochese's social security is 143-20-6070. Mr. Bochese has no prior adjudicated unpaid claim to disclose.

PLEASE BE GOVERNED ACCORDINGLY.

Sincerely,

/s/ Paul M. Meredith
Paul M. Meredith

cc: Ted Doran w/out enclosures
Richard Friedman w/out enclosures

enclosure: Appraisal

DORAN, WOLFE, ROST & ANSAY
ATTORNEYS
A PARTNERSHIP OF PROFESSIONAL ASSOCIATIONS
444 SEABREEZE BOULEVARD, SUITE 800
DAYTONA BEACH, FLORIDA 32118

[Name And Addresses Omitted In Printing]

February 13, 2003

Paul M. Meredith, Esquire
626 Reid Street
Palatka, FL 32177

Re: Alfred and Frances Bochese's Claim for Compensation Pursuant to § 70.001, Fla. Stat., "Bert J. Harris, Jr. Private Property Rights Protection Act"

Dear Mr. Meredith:

Accept this letter as formal notice of a written settlement offer pursuant to § 70.001(4)(c), Fla. Stat. on behalf of the Town of Ponce Inlet, Florida ("Town") in the aforementioned claim by Mr. and Mrs. Alfred Bochese. The Town offers no changes to its actions as they relate to the subject property as authorized by § 70.001(4)(c)(11), Fla. Stat.

As this letter constitutes a bona fide settlement offer, be aware that the Town shall seek reimbursement for attorney's fees and costs against your client upon prevailing in any suit filed by Mr. and Mrs. Bochese in this matter as provided for in the Act.

Please govern yourself accordingly.

Sincerely,

/s/ Theodore R. Doran
Theodore R. Doran
Town Attorney,
Town of Ponce Inlet, Florida

TRD/ccf

cc: Bernard J. Murphy, Town Manager
Town Council

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ALFRED L. BOCHESE,

Plaintiff,

-vs-

Case No.
6:02-cv-1253-Orl-28JGG

TOWN OF PONCE INLET,

Defendant.

JUDGE:	John Antoon II U.S. District Judge	DATE:	March 3, 2004
DEPUTY CLERK: Darleen Darley		COURT REPORTER: Anthony Rolland	
COUNSEL FOR PLTF.(S): Paul Michael Meredith		COUNSEL FOR DEFT.(S): Ernest H. Kohlmyer, III	

CIVIL CLERK'S MINUTES
FINAL PRETRIAL CONFERENCE/ORAL ARGUMENT
ON MOTIONS FOR SUMMARY JUDGMENT

(Filed Mar. 3, 2004)

9:00-9:12 am Court addresses posture of case.

Court **DISMISSES** all but Counts One and Two of the complaint; Order entered.

9:12-9:18 am. Court **DENIES** defendant's Motion to Strike Barbara Samolinski and Randy Rix [sic] as expert witnesses (Doc. No. 138). Defendant shall have opportunity to depose Mr. Rix [sic] on Monday, March 8,

	2004 at 9:00 a.m. Ms. Samolinski's appraisal shall not be admitted into evidence.
9:18-9:47 am	Defendant argues it's Motion in Limine (Doc. No. 145)
9:47-9:52 am	Plaintiff responds.
	Court **GRANTS** first part of defendant's Motion. Court **RESERVES RULING** on the second and third parts of defendant's motion.
9:53-9:53 am	Court **GRANTS** plaintiff's Motion to submit formatted jury instructions (Doc. No. 153).
9:56-11:35 am	Defendant argues its Motion for Summary Judgment.
10:30-10:50 am	Recess
11:35-12:05 pm	Plaintiff responds to motion for summary judgment.
12:05-3:00 pm	Recess
3:00-4:20 pm	Continuation of plaintiff's response to motion for summary judgment.
4:20-4:43 pm	Rebuttal by defendant.
4:43-4:45 pm	Court **DENIES without prejudice** all pending motions for sanctions (Doc. Nos. 132 and 138).
	Court **GRANTS** plaintiff's Motion to add exhibits and witnesses which were inadvertently omitted or not previously known at the time of filing the joint pretrial statement (corrected) (Doc. No. 152).

4:45-4:47 pm	Court and parties discuss estimated date for trial.
4:49 pm	Court takes motions for summary judgment under advisement.
4:49-4:55 pm	Court addresses trial procedures. Parties estimate approx. 7 days for trial.
4:56 pm	Court adjourned.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT COURT OF FLORIDA
ORLANDO DIVISION

CASE NO: 6:02-CV-1253-ORL-28JGG
JUDGE ANTOON

ALFRED L. BOCHESE

Plaintiff

vs.

TOWN OF PONCE INLET, a municipal corporation organized under the laws of the State of Florida

Defendant. /

[GRANTED* and SO ORDERED this 2d DAY OF Dec, 2003

/s/ James G. Glazebrook
JAMES G. GLAZEBROOK
U. S. MAGISTRATE JUDGE
*as to supplemental responses, which must be served on or before December 19, 2003; otherwise DENIED.]

PLAINTIFF ALFRED L. BOCHESE'S OPPOSED MOTION TO WITHDRAW AND AMEND CERTAIN SPECIFIC PREVIOUSLY SERVED ANSWERS TO THE TOWN'S REQUEST FOR ADMISSIONS WITH SUPPORTING MEMORANDUM OF LAW

(Filed Nov. 3, 2003)

The Plaintiff, ALFRED L. BOCHESE, by and through his undersigned counsel, files this motion, pursuant Fed.R.Civ.P. 36(b), to withdraw and amend certain specific previously served answers to the Defendant, TOWN OF PRINCE INLET'S Request for Admissions and as grounds therefore, states as follows:

1. On or about September 30, 2003, Plaintiff, ALFRED L. BOCHESE (hereinafter "BOCHESE") served upon the Defendant, TOWN OF PONCE INLET (hereinafter the "TOWN") answers to its Request for Admissions.

2. During the recent subsequent depositions of Peter B. Heebner (attorney for Ponce Inlet Lighthouse Properties, Inc.) on October 15, 2003 and Fred Treadway (CEO

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT COURT OF FLORIDA
ORLANDO DIVISION

CASE NO: 6:02-CV-1253-ORL-28JGG
JUDGE ANTOON

ALFRED L. BOCHESE

Plaintiff

vs.

TOWN OF PONCE INLET, a municipal corporation organized under the laws of the State of Florida

Defendant.

/

[DENIED* and SO ORDERED this 2d DAY OF Dec, 2003

/s/ James G. Glazebrook
JAMES G. GLAZEBROOK
U. S. MAGISTRATE JUDGE
*Bochese does not allege he cannot prove discovered facts at trial. May 5, 2003 was last day to amend pleadings. Docket No. 24 at 1 and 4.]

PLAINTIFF ALFRED L. BOCHESE'S OPPOSED MOTION FOR LEAVE TO AMEND HIS AMENDED VERIFIED COMPLAINT AND MEMORANDUM OF LAW

(Filed Nov. 3, 2003)

The Plaintiff, ALFRED L. BOCHESE, by and through his undersigned counsel, files this motion, pursuant to Fed R.Civ.P. 16(b), 15(a) and Local Rule 4.01 of the United States Middle District of Florida, to amend his Amended Verified Complaint filed herein and as grounds therefore, states as follows:

1. On or about October 21, 2002, Plaintiff, ALFRED L. BOCHESE (hereinafter "BOCHESE") filed his Verified Complaint for monetary damages and injunctive relief pursuant to 42 U.S.C. §1983. On December 30, 2002 the

Verified Complaint was served upon the Defendant, TOWN OF PONCE INLET (hereinafter "TOWN").

* * *

No. 05-062

AUG 1 1 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ALFRED L. BOCHESE,

Petitioner,

vs.

TOWN OF PONCE INLET, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an affected landowner lack standing to challenge the validity of a comprehensive zoning change to his property as an unreasonable and arbitrary exercise of legislative power because the landowner was not a third party beneficiary to a development agreement with a governmental entity that previously established the zoning classification of his property?

2. Does the "well-pleaded complaint" rule allow an appellate court in *de novo* review of summary judgment of a civil rights claim to ignore exhibits attached to the complaint and issues tried by express consent?

3. Is the Due Process Clause of the Fourteenth Amendment of the United States Constitution violated when litigants are not provided the opportunity to present legal arguments to subject matter jurisdiction challenges raise *sua sponte* by the court of appeals wherein those excluded legal arguments would have altered the court of appeals *sua sponte* determination as to its own jurisdiction?

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Rule of the United States Supreme Court, Rule 29.6, the Respondent, Town of Ponce Inlet, Florida, certifies to this Court that it does not have a parent corporation and there is no publicly held company that owns more than 10% or more of the party's stock.

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INTRODUCTION

The United States Court of Appeals for the Eleventh Circuit properly determined that the allegations contained in Petitioner/Plaintiff, Alfred L. Bochese's operative complaint failed to assert facts to demonstrate the requisite standing to invoke Article III subject matter jurisdiction before the court.

The ruling is consistent with United States Supreme Court and federal circuit court precedent which holds that "[a]n appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165, 79 L.Ed. 338 (1934) (*citing Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884)).

In this case, the Eleventh Circuit recognized, through its concurrence, that the district court properly granted summary judgment as to the merits, however, the opinion properly focused, *sua sponte*, on the fact that the circuit court did not have subject matter to review the decision as Bochese lacked standing to challenge issues related to a contractual relationship to which he was neither a party nor third party beneficiary.

The Respondent respectfully requests this Honorable Court to deny the petition for writ of certiorari and affirm the decision of the Eleventh Circuit in this matter.

STATEMENT OF THE CASE

On May 8, 1984, the Town Council of the Town of Ponce Inlet approved Ordinance 84-11, which interpreted

that the height restriction of 35 feet contained within the Town Charter, did not apply to certain zone classifications, including the T-1 zone classification (oceanfront properties). On or about July 25, 1986, the Town entered into a Development Agreement with the predecessors of Ponce Lighthouse Properties, Inc. (hereinafter referred to as "PLPI"), which provided for the rules, criteria and details for the development of a Planned Unit Development ("PUD") project. This PUD comprised an area of approximately 85 acres in the Town spanning from the intercoastal waterway on the west to the Atlantic Ocean. The Third Amendment provided that the maximum building height for the portion of the development property lying east of Atlantic Avenue, commonly referred to as the "Beach Club", would be restricted to 35 feet. The Beach Club would be constructed upon the property which was within a T-1 zone.[1] In May, 2000, the Town elected to retain the legal services of the law firm of Doran, Wolfe, Rost & Ansay, and have Ted Doran, serve as Town Attorney. On or about February 14, 2001, Richard Freidman, Executive Vice President of PLPI prepared, signed and submitted an application for Development Review with the Town seeking to include additional property to PLPI's existing PUD area. This proposed area encompassed four 100-foot ocean front lots in Ponce Inlet located immediately north of PLPI's proposed "Beach Club" property. As of February 2001, two of these oceanfront lots were already owned by PLPI while the remaining two were occupied by residential structures owned by Mr. Michael DiFranco and the Bocheses. The PLPI application sought to change the

[1] The Town's T-1 zoning classification is the most liberal zoning classification available.

zoning category of the entire area occupied by these four lots from T-1 to PLPI's already existing PUD classification. Section 5.5.8 of the Town's Land Use and Development describes the available uses for property located in zoning classification T-1. It is undisputed that the PLPI application falsely represented to the Town staff that *"The lots have either been purchased or under contract to be purchased by Ponce Lighthouse Properties, Inc."* It is further undisputed that Section 5.5.12(I) of the Town's Land Use and Development Code, requires that the applicant or contract seller must have ***unified ownership*** of the entire area within the PUD, at the time the application is made to the Town. Specifically, the term "unified ownership" is defined as *"All land within the PUD shall be under the ownership of one person, whether by deed, agreement for deed, or contract for purchase. PUD applicants shall present either an opinion of title by an attorney licensed in Florida or a certification by an abstractor or a title company, authorized to do business in Florida, that at the time of the application, unified ownership of the entire area within the proposed PUD is in the applicant or contract seller. Unified Ownership shall thereafter be maintained until after the recording of the overall development plan or final plat."* (Emphasis added)

On April 18, 2001, during a regular Town Council meeting, the issues of the inclusion of all four of these lots into the PUD were discussed by the Town Attorney and Town Council as well as the concern regarding an apparent conflict between Section 7.02 of the Town Charter and Ordinance 84-11 regarding height restrictions.

During the same period of time, the Town's Charter Review Committee, which included Bochese, amended various sections of the Town Charter. The Committee,

including Bochese, reviewed and elected to maintain the subject height restriction. On April 18, 2001, the Town Council passed Resolution 2001-08 which repealed Ordinance 84-11 leaving no exception to Section 7.02 of the Town Charter. The record reflects that Bochese appeared before the Town Council on April 18, 2001 and stated to the Council that he believed that Ted Doran, as Town Attorney, had a conflict of interest regarding his representation of the Town as to FEMA compliance matters while he was a shareholder of a local restaurant that may be non-compliant with FEMA flood requirements. During the same meeting, the Town Council unanimously approved PLPI's development application to include all four properties into their PUD. In addition, Mr. Doran expressed concern over the impact the Town Charter's height restriction had on the PLPI development project. In May of 2001, the Development Agreement was modified for the fourth time to specifically include the additional four lots based on the representations contained in the re-zoning application submitted by PLPI. The Fourth Amendment to the Development Agreement, contained a provision that 400 feet could be developed with buildings up to 70 feet in height and 300 feet could be developed with buildings not in excess of 35 feet. Not until August 2001, did PLPI actually execute Purchase and Sale Agreements with both the Bocheses and DiFranco. The Bochese/PLPI purchase agreement contained several addenda including the following condition: "*The contract is subject to the Buyer obtaining the necessary approvals from the Town of Ponce Inlet, Florida for the construction of a 70-foot high condominium in a manner and design acceptable to the Buyer at the Buyer's sole discretion. In the event that the Buyer has not received said approvals by the closing date, the Buyer shall have the option to close pursuant to the terms of the*

contract or terminate the Contract at its sole discretion." Both the DiFranco and Bochese contracts were scheduled to expire or close on or before December 1, 2001. Prior to August, 2001, PLPI had only non-binding proposals for sale with DiFranco or the Bocheses. On or about November 7, 2001, PLPI's counsel sent correspondence to the attorneys for Bochese and DiFranco requesting an extension to the existing purchase agreement. Bochese agreed to an extension until March 1, 2002 and executed Addendum 2 to the Purchase Agreement. This addendum contained the same condition precedent as to the required approvals for a 70-foot building. DiFranco rejected the extension and his purchase agreement expired as of December 1, 2001. In December, 2001, DiFranco notified the Town that PLPI did not own or have a contract to purchase his property which still remained in the PUD via the Fourth Amendment. Mr. DiFranco requested the Town to remove his property from the PUD. On February 20, 2002, the Town Council scheduled a Special Meeting to address how to handle this dispute. Ted Doran, as Town Attorney, prepared a memorandum which outlined the factual representations made to the Town and the recommended potential options for the Council's consideration. As a result of the meeting, the Town Council elected 4-0 to rescind the entire Fourth Amendment, however, granted a one week extension to revisit this issue. It is undisputed that representatives of PLPI, as well as property owners, DiFranco and Mrs. Bochese were in attendance at this Town Council meeting. A transcript and audio tape of this meeting were filed in support of the Town's motion for summary judgment.

On February 27, 2002, the Town Council, again met in a Special Meeting and took comments from the PLPI

representatives, staff recommendations, and audience comments. After considering presentations made by PLPI, Town Staff, and public comment, the Town Council unanimously elected to adopt Resolution 2002-10 which rescinded the Fourth Amendment by removing all four of the previous T-1 properties and changed their zoning classification back to their original status. During the meeting, Bochese was present and voiced his objection to Section 4 of the Resolution. Resolution 2002-10 provided reasons for the rescission of the Fourth Amendment. Each voting member of the Town Council testified under oath that the reasons for the rescission of the Fourth Amendment to the Development Agreement were not related in any manner to Bochese or for the purpose of retaliation against Bochese for any statements, comments, or actions directed to the Town Council or Ted Doran. In addition, Town Attorney, Ted Doran, testified as to his legal analysis and advice to the Town Council in this matter. More importantly, Doran denied taking any action or giving legal advice for the purpose of retaliating against Bochese in any way. Finally, Suzanne Konchan, Town Planner, testified that she presented her professional opinion as to this issue and advised the Town Council to start "afresh" by rescinding the Fourth Amendment and allow PLPI to resubmit a new application and concept plan. Copies of the minutes and transcript of this Special Meeting of the Town of Ponce Inlet were also attached to the Town's motion for summary judgment.

In March, 2002, the Town and PLPI executed a Fifth Amendment to the Development Agreement. After March 1, 2002, the PLPI representatives agreed not to exercise PLPI's option to purchase the Bochese property at its contractual sale price until a successful outcome in a declaratory

judgment action had been obtained to allow construction of a 70-foot condominium. Bochese continued to receive monthly installment payments until at least March 2003 as consideration to keep the property available. At no time did any representative from PLPI file a request to include the Bochese property back into the remaining PUD "ocean front" project. At no time did Bochese file a request to include and incorporate his property back into the remaining PUD "ocean front" project. At no time prior to November 2002, did PLPI receive final development approval to construct a 70-foot condominium on the subject property.

The Fifth Amendment sought to correct the changes to the PUD specifically related to the Beach Club and the removal of all property east of the Atlantic Avenue and all the areas in dispute. The Town Council also instructed the Town Attorney to file a declaratory action in the Circuit Court in order to determine the legal implications of the approval, and subsequent repeal of Ordinance 84-11 by the Town as it relates to the existence of the Fourth Amendment to the Development Agreement. The original declaratory action named PLPI, and property owners, DiFranco, Jacobs, Bochese and the Towers VII Condominiums as respondents.[2] It was the Town's intention to seek the court's determination as to whether PLPI had the right to construct buildings at a height in excess of 35 feet on all or part of its oceanfront property, rather than the 35-foot height limitation provided by the Town Charter. It

[2] Bochese, as a party, was voluntarily dismissed from the Town's declaratory action after Bochese's counsel, Paul Meredith, Esquire, filed a motion to dismiss the declaratory action. However, PLPI still maintained that it had an interest in the Bochese property and the subject property was included in the disposition of the declaratory action.

was the Town's position that DiFranco, Jacobs and the Tower VII Condominiums had a valid argument that the ordinance adopted and/or the agreement executed violated the Town Charter, which constituted an *ultra vires* act, making the legal effect void as to the rights of the Town and the rights of PLPI.

As a result of the declaratory action, PLPI filed a counter-petition claiming damages resulting from an alleged diminution of the market value of the property due to their inability to develop the property as they anticipated. After the conclusion of a hearing on the merits of the declaratory actions filed by the Town and PLPI, the Circuit Court of Volusia County issued an order, including stipulations of fact, concluding that PLPI could not construct a 70-foot condominium on the "ocean front" property as proposed. The court further concluded that *"The Petitioner, TOWN OF PONCE INLET, FLORIDA, through its council, properly adopted a resolution and Fifth Amendment on February 27, 2002, thereby re-establishing the thirty-five foot height limitation to the Beach Club property."*[3] The Circuit Court issued a substituted order dated on April 11, 2003 which stated the following: *"The Town Council properly repealed the Fourth Amendment to the Development Agreement and properly adopted the Fifth Amendment. This action left in effect the Third Amendment to the Development Agreement regarding the Beach Club phase, which limited construction on that phase to 35 feet. The developer accepted that Amendment. Thus, no claim of estoppel is warranted."*[4] Further, the court stated

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[3] *See* Appendix A.

[4] *See* Appendix B.

"At the time of the repeal of Ordinance 84-11 and the approval of the Fifth Amendment, no construction had yet begun on the properties zoned T-1, added to the PUD, and regardless of any vested rights of the PUD, no such estoppel rights attended the added property, and the Town is entitled to declaratory relief that the development proposed by the Respondent Ponce Lighthouse Properties, east of Atlantic Avenue only, is subject to the 35-foot height restriction." This ruling included the Bochese property. Thereafter, no appeal was taken by any party and the ruling of the Circuit Court of Volusia County became final and binding upon all parties and interested persons.

The Town of Ponce Inlet, through its employees, officials, and retained counsel have denied and continue to deny that any action in this matter was based on any retaliatory motive or intent against the Petitioner and no evidence was demonstrated to the contrary. Therefore, the Town specifically rejects and denies any allegations contained in the Petitioner's Statement of Facts which suggest such falsehoods.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Respondent respectfully prays that this Honorable Court deny the Petitioner's request for a writ of certiorari and affirm the decision of the United States Court of Appeals for the Eleventh Circuit. The decision below does not conflict with a decision of this Court, or any other federal circuit court, since the determination of standing to assess federal court jurisdiction was well supported by binding precedent established in this Court

and Eleventh Circuit. The petition, which relies upon the holding and dicta of this Court's decisions in *Village of Euclid v. Amber Realty*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), and *Kelo v. New London, Connecticut*, 545 U.S. ___, 125 S.Ct. 2655, ___ L.Ed.2d ___ (2005) does not accurately demonstrate that these cases are conflicting precedent based on the specific factual circumstances established before the district court and the circuit court below.

ONE

Review of Petition for Writ of Certiorari Should Be Denied as the Underlying Decision of the Eleventh Circuit Regarding Petitioner's Lack of Standing Does Not Conflict with the Decisions of the United States Supreme Court or Other Federal Circuit Courts

The petition for writ of certiorari should be denied since the underlying decision of the Eleventh Circuit regarding Bochese's lack of standing does not conflict with the decisions of the United States Supreme Court or other circuit courts.

Question One presented in the petition incorrectly characterizes the Town's action as a "comprehensive zoning change" to Bochese's property. As stated above, PLPI presented an application to incorporate the Bochese property under PLPI existing PUD classification so long as PLPI met the conditions under the Town's Land Development Code. Once PLPI failed to meet the unified ownership condition under the Town's LDC, the subject properties, including Bochese's property were returned to its former zoning classification. In this case, the Eleventh

Circuit held that Bochese had no standing to challenge issues involved in the development agreement between the developer, PLPI and the Town. Thus, the court did not have subject matter jurisdiction.

Accordingly, "[w]hen a federal court acts outside its statutory subject-matter jurisdiction, it violates the fundamental constitutional precept of limited federal power." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212, 92 S.Ct. 418, 425, 30 L.Ed.2d 383 (1971) *citing Oliver v. Trunkline Gas Co.*, 789 F.2d 341, 343 (5th Cir. 1986). Indeed, such an action unconstitutionally invades the powers reserved to the states to determine controversies in their own courts, *see*: *Victory Carriers*, 404 U.S. at 212, 92 S.Ct. at 425 (*quoting Healy v. Ratta*, 292 U.S. 263, 270, 54 S.Ct. 700, 703, 78 L.Ed. 1248 (1934)), as well as "offends fundamental principles of separation of powers," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S.Ct. 1003, 1012, 140 L.Ed.2d 210 (1998). Once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue. This principle of law extends back as far as this Court's opinion in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 19 L.Ed. 264 (1868), which held that "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* at 514; *see also Wernick v. Mathews*, 524 F.2d 543, 545 (5th Cir. 1975) ("[W]e are not free to disregard the jurisdictional issue, for without jurisdiction we are powerless to consider the merits.").

> The jurisdiction of a court over the subject matter of a claim involves the court's competency to consider a given type of case, and cannot be

> waived or otherwise conferred upon the court by the parties. Otherwise, a party could 'work a wrongful extension of federal jurisdiction and give district courts power the Congress denied them.'

See: *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1000-01 (11th Cir. 1982) (*quoting American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 18, 71 S.Ct. 534, 542, 95 L.Ed. 702 (1951)).

A necessary corollary to the concept that a federal court is powerless to act without jurisdiction is the equally unremarkable principle that a court should inquire into whether it has subject matter jurisdiction at the earliest possible stage in the proceedings. Indeed, it is well settled that a federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking. *See*: *Fitzgerald v. Seaboard Sys. R.R.*, 760 F.2d 1249, 1251 (11th Cir. 1985) (*per curiam*); *Wernick*, 524 F.2d at 545; *see also Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1102 (5th Cir. 1981) (*per curiam*) (holding that courts must constantly examine the basis of their jurisdiction before proceeding to the merits). Moreover, "[a]n appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165, 79 L.Ed. 338 (1934) (*citing Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884)).

This Court in *Vermont Agency of Natural Res. v. United States ex rel. Stephens*, 529 U.S. 765, 771, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) stated, "Standing is a doctrine that 'stems directly from Article III's "case or controversy" requirement and thus it implicates our subject

matter jurisdiction.'" Standing is "perhaps the most important" jurisdictional doctrine. *United States v. Hays*, 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995). This obligation is imperative whether the issue is raised by the parties or at any stage of the litigation. *See*: *Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 759 (11th Cir. 1991).

In this case, the petition for writ of certiorari must be denied since the Eleventh Circuit's correctly determined that Bochese lacked standing to challenge the terms and conditions of a contractual relationship between the Town of Ponce Inlet and the developer, PLPI. The Eleventh Circuit opinion properly recognized and concluded that the "plaintiff has burden to 'clearly and specifically set forth facts sufficient to satisfy Article III standing requirements.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). "If the plaintiff fails to meet its burden, this court lacks power to create jurisdiction by embellishing a deficient allegation of injury." *Id.*

Although the Eleventh Circuit candidly, yet correctly characterized Bochese's allegations as a "moving target" throughout the litigation, the circuit court's decision correctly understood that any and all claims against the Town asserted in his First Amended Complaint purportedly arose out of PLPI's development application and the Fourth Amendment to the Development Agreement with the Town. More disturbing, Bochese mis-characterizes his re-zoning argument as articulated in the petition as if these new claims were actually subject matter raised before the district court and circuit court below. The Eleventh Circuit opinion clearly stated that Bochese's attempts to re-adjust his arguments and claims were denied by the district court and were not raised on appeal.

The circuit court's opinion clearly reprimanded Bochese's counsel for his attempt to alter the contents of the appellate record by inserting a copy of a proposed Second Amended Complaint that was not included in the original court record. Therefore, the circuit court properly reviewed only those allegations which were contained in Bochese's operative pleading, his First Amended Complaint served on July 3, 2003. Based on the allegations contained in that operative pleading, the circuit court correctly determined that Bochese did not have standing to challenge contractual issues between the Town and PLPI regarding the development of a 70-foot condominium.

Bochese attempts to conjure up a conflict with this Court's precedent where none exists by pointing to this Court's decisions, including its dicta, in *Euclid, supra*, *Kelo, supra*, or *Palazzolo, supra*. Other than the similarity that all of the cases cited are land use issues, nothing in these opinions governs, or even conflicts with the Eleventh Circuit's finding that Bochese did not have standing to challenge issues to which he was neither a contractual participant or a legally recognized third party beneficiary. Thus, the underlying opinion of the Eleventh Circuit is not conflicting with any decision of this Court or any other federal circuit opinions based on the specific factual circumstances presented before the district court and the Eleventh Circuit.

Therefore, Respondent respectfully requests this Honorable Court to summarily deny the petition for writ of certiorari as to Question One as presented.

TWO

Review of Petition for Writ of Certiorari Should Be Denied as the Underlying Decision of the Eleventh Circuit Does not Contradict the Application or Use of the "Well Pleaded Complaint" Rule of Other Decisions of the United States Supreme Court or Other Federal Circuit Courts

The petition for writ of certiorari should be denied since the underlying decision of the Eleventh Circuit does not contradict the application or use of the "well pleaded complaint" rule as established under federal court precedent. As grounds for affirming the district court's opinion on the issue of standing, the circuit court properly limited the determination of Bochese's standing to raise a constitutional claim based upon the allegations contained in its operative complaint filed and served on July 3, 2003. It is well settled that a court has the inherent power to control its trial docket and limit the number and manner in which pleadings are amended. *See*: *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962); *Royal Palace Hotel Associates, Inc. v. International Resort Classics, Inc.*, 178 F.R.D. 588 (M.D. Fla. 1997). In addition, it is well settled that the Eleventh Circuit as well as all other circuit courts use the abuse of discretion standard when reviewing a district court's decision to grant a motion for leave to amend the pleadings. *See*: *Diesel "Repower," Inc. v. Islander Investments, Ltd.*, 271 F.3d 1318 (11th Cir. 2001).

Even more obvious is that the Plaintiff's counsel, in the preparation of the required Case Management Report, agreed to the actual deadline (i.e., May 5, 2003), in which he could add parties or amend the pleadings. The circuit court clearly determined that Bochese was allowed, despite the Town's objection to amended his original

Complaint and file his First Amended Complaint on July 3, 2003 after the amendment deadline had expired. When Bochese attempted to amend his First Amended Complaint for the second time on November 3, 2003, despite the Town's objection, the district court denied Plaintiff's motion. As a basis for the denial the district court cited the May 5, 2003 deadline and considered the motion untimely.[5] Implicit in the circuit court's opinion is the fact that the court found that Bochese's November 3, 2003, motion for leave to amend was not granted and therefore, the issues or claims raised in the "proposed" Second Amended Complaint were not before the court to consider in its determination of subject matter jurisdiction.

It is also important for the Court to fully understand and appreciate the complete lack of merit of this argument since the petition failed to advise the Court that Bochese, by and through his counsel of record has subsequently filed a lawsuit in the Circuit Court of Volusia County, Florida in which he asserts a claim under Florida's Bert J. Harris Act, Section 70.001 *Fla. Stat.* for the exact issues that he claims he was denied in the case at bar.

Further, Bochese asserts that the court erred in failing to consider this omitted argument because the

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[6] It should be noted that the Town failed to receive an opinion from the district court on its Motion to Dismiss Plaintiff's First Amended Complaint prior to the November 4, 2004 deadline to file its Motion for Summary Judgment and the Town was forced to file its Motion for Summary Judgment without any indication as to which claims were even actionable. Thus, it was argued that if Plaintiff was granted leave to amend one day prior to the deadline to file its Motion for Summary Judgment and after discovery had been closed, the Town would have been prejudiced. This point was addressed in the Town's Response Brief to the Eleventh Circuit.

parties expressly consented to try this issue in the Joint Pre-Trial Statement. On the contrary, there is no evidence in the record, that the parties "expressly agreed" to try issues that were not included in the operative pleading filed in July 2003 or that the Town agreed to include new or different issues that were sought to be asserted in Bochese's Second Amended Complaint despite its objection to the motion for leave to amend.[6] Further, the Town had already filed its motion for summary judgment specifically addressing only those issues and claims raised in the First Amended Complaint.[7] Therefore, since the court properly excluded this issue of Ordinance 84-11 as sought in Plaintiff's Second Amended Complaint and therefore not addressed in the Town's motion for summary judgement as an issue before the court, it is disingenuous of Bochese to assert that such allegations were properly before the district or circuit court based on the expressed consent of the Town.

Further, the petition erroneously asserts that the Eleventh Circuit opinion below left unchecked will create confusion and inconsistency amongst the circuits in applying Rules 10(c) and 15(b) of the Federal Rules of Civil Procedure. Nothing in the Eleventh Circuit's opinion actually conflicts with the provisions of Fed. R. Civ. P. Rule

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[6] This argument is raised for the first time before this Court as well as any other court. The "express consent" argument was not raised by the Petitioner at any stage before the Eleventh Circuit, even when given the opportunity during oral argument to address the standing issue.

[7] App. 50-1 of the Petition contains the district court's grounds for granting the Town's Motion for Summary Judgment because Bochese failed to provide any record cites making it difficult to discern what evidence was being offered by the Plaintiff to defeat summary judgment.

15(d) since the review of the contents of the filed Joint Pretrial Statement did not create express consent that additional new claims would be tried that were not already contained in the operative pleading. The Joint Pretrial Statement filed with the court does not create subject matter jurisdiction by expressed consent of the parties nor should the document allow Bochese to circumvent an order of denial to amend the pleadings.[8] Nothing contained in the parties joint pre-trial statement demonstrates that the Town consented to new or different issues to be tried that were not alleged in the July 3, 2003 operative complaint and therefore the petition based on Question Two must be summarily denied.

THREE

Review of Petition for Writ of Certiorari Should Be Denied Because the Petitioner Improperly Attempts to Raise a Collateral Due Process Argument Arising out of the Eleventh Circuit's Decision to Find a Lack of Subject Matter Jurisdiction as a Ground for Affirming the District Court's Opinion

The petition for writ of certiorari should be denied because Bochese improperly attempts to raise a collateral due process argument arising out of the Eleventh Circuit's decision to find a lack of subject matter jurisdiction as a ground for affirming the district court's opinion. Bochese now attempts to assert a new constitutional claim or

[8] Inclusion of Paragraph 27 of the J.P.T.S. does not represent the Town's expressed consent to create and include this statement as a triable issue before the court since Plaintiff's statement was inserted in the J.P.T.S. despite objection by the Town.

alleged wrong that he was denied due process under the Fourteenth Amendment caused by the circuit court's *sua sponte* determination of a lack of standing to maintain subject matter jurisdiction under Article III. Bochese erroneously asserts that the issue of standing was not raised in the district court and therefore counsel was denied an opportunity to address this issue before the circuit court. Although the circuit court's decision recognized that the district court's ruling contained a non-jurisdictional basis for granting summary judgment since Bochese suffered no actual injury, the court record reflects that Bochese's counsel was given full opportunity to address the issue of standing during oral argument before the Eleventh Circuit on December 7, 2004. A review of the transcript of the oral argument will reveal that the standing determination was raised by Judge Marcus in the very first question directed toward Mr. Meredith and the undersigned during the respective portions of oral argument. Following oral argument, the record is undisputed that Bochese, by and through his counsel, did not seek to address the standing issue by either providing supplemental briefs or case law to the court, or even attempt to file a motion for re-hearing or re-hearing *en banc* to review this issue before or after the actual opinion was rendered by the court.[9] Further, since the issue of subject matter jurisdiction cannot be waived or consented to by the parties, subject matter jurisdiction and standing must always be at the forefront of plaintiff's counsel's mind at

[9] Bochese's motion to supplement the court record with new evidence, including affidavits was denied by the Eleventh Circuit prior to oral argument. Although, Bochese did file a Notice of Supplemental Case Law following oral argument, none of the cases addressed the standing issue discussed during oral argument.

all stages of the litigation. For Bochese to claim that he was "blind-sided" by a jurisdictional argument is factually incorrect and without merit. Therefore, the circuit court's standing determination in this case is not in contradiction to the holdings of other circuits and thus does not invoke the jurisdictional review of this Court.

Finally, Bochese claims he was prejudiced by the circuit court's actions since he was not provided an opportunity to fully litigate the issues of this case. As the record clearly indicates, both courts below provided Bochese a full and fair opportunity to litigate his claims, including but not limited to, (1) allowing Bochese to amend his pleadings once outside the scheduling order deadline, (2) allowing Bochese an additional 30 days to take discovery beyond the discovery cut-off deadline established by the scheduling order, (3) providing Bochese an unprecedented entire court day to articulate his opposition to the Town's motion for summary judgment, and (4) providing Bochese with appellate review, including the opportunity for re-hearing or re-hearing *en banc*, plus oral argument to redress his perceived errors in the district court rulings. Further, the exact legal issue which Bochese claims he was denied an opportunity to redress in this case is currently pending in a Florida state court case.[10]

Therefore, Respondent respectfully requests this Honorable Court to summarily deny the petition for writ of certiorari as to Question Three as presented.

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[10] *See* Appendix C. The Respondent makes no representations that the pending Bert J. Harris Act claim in the Circuit Court of Volusia County has any merit or is even viable pursuant to the doctrine of equitable estoppel.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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**Counsel of Record*

APPENDIX A

IN THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

THE TOWN OF PONCE INLET, FLORIDA, a municipal corporation of the State of Florida,

Petitioner,

vs.

CASE No. 2002-30561 CICI (32)

PONCE LIGHTHOUSE PROPERTIES, INC., a Florida corporation, et al.,

Respondents,

ORDER ON PETITIONS FOR DECLARATORY JUDGMENT

THIS CAUSE came on before the court on January 17, 2003, to consider the following matters: Petition for Declaratory Relief filed by the Petitioner, TOWN OF PONCE INLET, on March 7, 2002, joined in by Respondents, TOWERS VII CONDOMINIUM ASSOCIATION, INC., MICHAEL DiFRANCO, ELIZABETH DiFRANCO, DAVID JACOBS and ANN JACOBS, by Answer filed May 6, 2002; and Respondent, PONCE LIGHTHOUSE PROPERTIES, INC., Counter-petition for Declaratory Relief and Injunctive Relief filed April 10, 2002. Counsel for the parties having been present and heard, and the court having read the supporting memoranda and authorities cited and being duly advised in the premises, finds as follows:

The parties have stipulated to the majority of the material facts in this case. The court also has considered the numerous exhibits admitted by the parties for the purpose of confirming and supplementing the admitted facts as necessary. These material facts are set out below.

FACTS AS TO THE HEIGHT RESTRICTION

1. The Petitioner, ~~TOWN OF~~ PONCE INLET, (hereinafter "TOWN") was formed in 1963 under a model charter which did not address planning or zoning issues. Rather, the charter, at Article X, deferred all planning decisions to the Town Council and all zoning decisions to the South Peninsula Zoning Board. The Zoning Board enacted Resolution 74-14 to serve as zoning regulations for the TOWN. The Zoning Board later enacted Resolution 74-22 to zone certain property owned by the Teachers Retirement System of Georgia as a Planned Unit Development ("P.U.D".)

2. Respondent, PONCE LIGHTHOUSE PROPERTIES, INC., (hereinafter ~~"PONCE~~ LIGHTHOUSE") is the current record owner of a parcel of realty, approximately 178 acres in size, which was zoned as P.U.D. by Resolution 74-22. The sub-parcel at issue herein is described as the "Beach Club" consisting of approximately three hundred feet of oceanfront property within the TOWN.

3. On or about October 13, 1976, the TOWN council passed Resolution 76-18 amending Resolution 74-22 to limit the height of residential buildings to seven stories. It also adopted previous actions of the South Peninsula Zoning Board.

4. On or about September 14, 1977, the TOWN adopted Ordinance 77-10. This ordinance created zoning regulations within the town. It also set forth building height limitations for P.U.D.'s at seventy feet and no more than seven stories north of Inlet Harbor Road and no more than thirty-five feet south of Inlet Harbor Road.

5. On or about August 24, 1983, the TOWN Council passed Ordinance 83-012. This ordinance placed a proposed amendment to the Charter before the electors of the TOWN at a referendum to be held in November 1983. The proposed amendment is quoted as follows: "(a) Shall the Charter of the Town of Ponce Inlet, Florida, be amended to limit all buildings in the Town to a maximum height of thirty-five (35') feet?" The ordinance recited several reasons supporting the restriction, one of which was that "a proliferation of buildings exceeding thirty-five (35') in height will negatively impact the quality of life within the Town of Ponce Inlet." The proposed amendment was approved by a majority of the electors at the referendum held November 8, 1983. It became effective on November 29, 1983 upon filing with the Florida Secretary of State. The subject charter amendment was incorporated into the revised charter of the Town of Ponce Inlet effective January 16, 1984. Town Charter Article VII (Zoning), at Section 7.02 (Height limitation), reads as follows:

> Building within the Town of Ponce Inlet shall be limited to a maximum height of thirty-five (35) feet.

The charter amendment contained no exemptions, exclusions or other language limiting the height restriction.

6. On May 9, 1984, the TOWN Council adopted Ordinance 84-11. The ordinance created an exception to

the charter amendment of November 8, 1983 stating that the thirty-five foot height limitation would not apply to property zoned "T-1" as of November 8, 1983 nor to properties developed with buildings or buildings under construction with an existing or planned height greater than thirty-five feet but not more than seventy feet. The council stated in the ordinance that it was the "interpretation of the Town Council that the charter amendment adopted by the electors does not require that all property presently zoned to permit buildings of a height in excess of thirty-five (35') shall be restricted in the future to prohibit buildings of a height no greater than thirty-five (35') feet. . . ." It states:

> (c) Properties zoned Planned Unit Development (P.U.D.) may be developed under the terms and provisions of applicable P.U.D. agreements between the Town and property owner, or developer of property classified P.U.D. as of November 8, 1983.

7. On or about November 20, 1985, the TOWN approved Ordinance 85-27 which established new zoning regulations for the Town. It repealed Ordinance 77-10 and incorporated any orders or resolutions pertaining to P.U.D.'s and Ordinances 84-10 and 84-11. Section 700.09 entitled "T-1, Tourist Accommodations," under the subsection "Maximum Building Height," states "35 feet, except that the maximum building height shall be 70 feet in all districts that existed prior to the effective date of Ordinance 84-11 implementing the referendum of November 8, 1983 that restricted building height to 35 feet. The provisions of Ordinance 84-11 shall not be affected and shall remain in full force and effect."

8. On or about July 14, 1986, the TOWN council adopted Ordinance 86-12. It approved the Development Agreement with PONCE LIGHTHOUSE's predecessors in title. It was signed by the mayor, all members of the Town council and the developer. Paragraph one, states the following:

> However, it is understood by all the parties hereto that the Developer retains vested rights to the P.U.D. zoning and all of the prior terms and conditions of that zoning, except as amended by this Agreement, and that by entering into this Agreement, there is no waiver of any prior terms and conditions or vested rights in the zoning and terms and conditions attached thereto.

Paragraph six states the following:

> It is understood and agreed by the parties hereto that the amendments to the Town's Charter restricting the height of buildings constructed within the municipal limits to thirty-five feet (35') do not apply to the P.U.D. To the extent that there is a specific conflict between this Agreement and existing Town Resolutions and regulations, this Agreement shall control. The Developer agrees to be bound by all other applicable provisions of the Town's Zoning Ordinance not in conflict with this Development Agreement and other applicable Ordinances, including the Subdivision Ordinance and the Stormwater and Conservation Ordinance in force as of the date of the execution of this Agreement, or future amendments of said Ordinances where not inconsistent with this Agreement. This Agreement may be amended by mutual agreement of the parties, their heirs, successors, or assigns.

Paragraph twenty states the following:

> Unless otherwise specified in this Agreement, the ocean-front section of the P.U.D. . . . will be developed in accordance with the requirements set forth in the Zoning Ordinance of the Town of Ponce Inlet (Ordinance No. 85-27) in category "T-1", Tourist Accommodation, in force at the time of this Agreement. The maximum building widths will be two hundred fifty feet (250'). The minimum separation between buildings will be fifty-five feet (55'). However, building separation will be maximized whenever possible. The building height shall be the minimum required to allow construction of buildings having the first floor parking, plus seven (7) stories of apartments, with nine foot (9') ceilings, a truss roof and standing elevator equipment facilities. The actual building height will not exceed eighty-five feet (85') from the existing ground level.

The Development Agreement was modified and recorded in the public records of Volusia County in December 1993 (the First Amendment); March 1996 (the Second Amendment); and November 1996 (the Third Amendment). The Third Amendment states the following regarding the Beach Club property:

> The maximum building height for the beach club will be thirty-five (35) feet. . . .

9. The TOWN issued building permits to developers other than PONCE LIGHTHOUSE that allowed construction of seven-story condominium buildings on the following dates: June 15, 1988; December 29, 1988; August 2, 1990; March 19, 1992; December 31, 1992; February 25, 1994; December 4, 1995; June 17, 1997; January 14, 1998; December 17, 1998; August 26, 1999, and May 21, 2002.

The TOWN issued building permits to build a cellular telephone tower to a height in excess of thirty-five feet on August 23, 2000. The TOWN issued building permits for five-story condominium buildings on August 20, 2000, October 24, 2000, January 3, 2001, April 17, 2001, May 17, 2001, and July 13, 2001. The TOWN issued building permits for four-story condominium buildings on June 13, 2001.

10. The TOWN amended and re-adopted its charter in 1990. This charter sets forth the same building height limitation of thirty-five feet with no exemptions or exceptions.

11. The TOWN council adopted Ordinance 2001-08 on or about April 18, 2001. This ordinance repealed Ordinance 84-11 in its entirety and amended the Land Use and Development Code to eliminate all exceptions to the thirty-five foot height restriction.

12. On May 21, 2001, a Fourth Amendment to the Development Agreement was executed by the parties. It stated that of the seven hundred feet of ocean frontage, four hundred feet could be developed with buildings up to seventy feet high and three hundred feet would be developed with buildings not in excess of thirty-five feet. This fourth amendment included four additional lots (having ocean frontage of 100 feet each) north of the "Beach Club." PONCE LIGHTHOUSE represented to the TOWN in its application for "Future Land Use Map Change, P.U.D. Amendment and Overall Development Plan" dated February 14, 2001 that the four additional lots (two of which were owned by Messrs DiFranco and Bochese) " . . . have either [been] purchased or are under contract to be purchased by Ponce Lighthouse Properties, Inc." The definition

of "Planned Unit Development" in the TOWN's Land Use and Development code is "A tract of land under unified ownership. . . ." Section 5.5.12(I) of the TOWN's Land Development Code provides that, at the time of applications related to a P.U.D., the applicant or contract seller must have unified ownership over the entire area within the P.U.D., and that unified ownership shall thereafter be maintained until after the recording of the overall development plan or final plat. Amendments to the development agreements are subject to final approval by the TOWN council.

13. Of the four additional beachfront lots included within the Fourth Amendment to Development Agreement, two (the DiFranco and Bochese lots) were not owned by the Developer, PONCE LIGHTHOUSE, at the time of application for amendment to the P.U.D. nor are they owned by the Developer to date. On or about December 31, 2001, Mr. DiFranco corresponded with the TOWN requesting that his property be removed from the P.U.D.

14. On or about December 1, 2001, an amended charter for the TOWN took effect. It states "Building within the Town of Ponce Inlet shall be limited to a maximum height of thirty-five (35) feet."

15. On February 27, 2002, the TOWN council adopted a resolution and a Fifth Amendment to the Development Agreement. The Fifth Amendment rescinded the Fourth Amendment which had been executed by the parties on May 21, 2001. Among the council's stated reasons adopting the Fifth Amendment rescinding the Fourth Amendment was the following: PONCE LIGHTHOUSE's false representation that it owned or maintained contracts to purchase the DiFranco and Bochese properties.

This violated the provisions of the requirement for unified ownership set forth in the Land Development Code. At the time of the effective date of the rescission, PONCE LIGHTHOUSE did not possess a contract to purchase the DiFranco property.

16. The Fifth Amendment to the Development Agreement was executed by the TOWN and PONCE LIGHTHOUSE on March 7, 2002. It rescinds the Fourth Amendment. It removed the four beachfront parcels from the P.U.D. and restored the status of the provisions relating to the Beach Club parcel as provided in the Third Amendment dated November 25, 1996. That Third Amendment set forth the following provisions relating to the Beach club property at issue herein:

> The maximum building height for the beach club will be thirty-five (35) feet. The building set back from the south property line shall be twenty-five (25) feet. The residential lot shall have a maximum building height of twenty-five 25) feet and side lot set back of ten (10) feet on the north property line and ten (10) feet on the south property line.

FACTS AS TO THE GORDIS PRESTON LINE

1. Ordinance 85-27 adopted on or about November 20, 1985, at section 700.13, established a twenty-five foot setback from any P.U.D. perimeter such that the Atlantic Ocean bulkhead is considered part of such perimeter.

2. On or about June 19, 1991, the TOWN approved Ordinance 91-10 amending Ordinance 85-27 regarding the construction setback from the Atlantic Ocean. This ordinance states in pertinent part the following:

WHEREAS, the Town Council finds that existing principal structures located on oceanfront property have been constructed in uniformity to each other in many cases thereby preserving riparian rights to the light, air and view of the Atlantic Ocean, and

WHEREAS, the existing zoning regulations of the Town of Ponce Inlet in some situations would permit the construction of principal residences on oceanfront properties in such a manner so as to not be in uniformity with preexisting principal structures, and

WHEREAS, the Town Council finds that it is in the best interest of the Town and the citizens of the Town to establish a method for determining a setback line for the construction of principal structures so that the setback of principal structures to be constructed in the future will be uniform with preexisting principal structures already constructed on oceanfront property.

(2) Setback line shall mean "a straight line determined by a sealed land survey, connecting the seaward most portions of the closest adjacent principal structures to the north and south of the proposed construction site."

(3) The applicant for a permit for construction on any property within the Town of Ponce Inlet, Florida abutting the Atlantic Ocean shall provide as a part of said application, a survey identifying the setback line and the proposed structures.

This ordinance is commonly referred to as the "Gordis-Preston Line."

3. The Land Use and Development Code incorporates the Gordis-Preston Line at section 5.6.3. The code at

section 5.5.8 has always contained a minimum setback from all waterfront of twenty-five feet for all other zoning categories.

4. On June 25, 2001, PONCE LIGHTHOUSE submitted an application to the TOWN for construction of a seven-story condominium on the subject property site. The proposed principal structure would extend easterly beyond the Gordis Preston Line as defined by the existing structures to the north and south. This would interfere with the ocean view of residents in existing structures to the north and south. The TOWN's Development Review Team conducted a review of the proposed plans and reported on June 9, 2001 that the plan must "show the principal structure conforms with the Coastal Construction Setback Line (*Gordis Preston Line*)." On July 11, 2001, the TOWN's representative, Mr. Ron Thommason, notified PONCE LIGHTHOUSE that no principal structure was to extend seaward of the "Gordis-Preston" line.

5. On November 12, 2001, PONCE LIGHTHOUSE's engineer corresponded with the TOWN to request a variance from the waterfront setback requirement (the Gordis Preston line). The request recited his opinion that a "strict application of this set-back would result in an unreasonable and undue hardship." At hearing before the court, the attorney for PONCE LIGHTHOUSE advised that moving the principal structure westerly (to conform with the Gordon Preston Line) would cause the planned parking area to conflict with the right-of-way of South Atlantic Avenue. PONCE LIGHTHOUSE believes this would be unreasonable and create undue hardship upon it.

6. There is no allegation in the counter-petition, nor has the fact been established, that the TOWN has made a

final administrative determination as to the request for variance by PONCE LIGHTHOUSE.

DISCUSSION AND ORDER

The parties have submitted for argument and determination their respective motions for declaratory judgment upon (1) whether PONCE LIGHTHOUSE has the right to build a structure to a height in excess of thirty-five feet, in apparent violation of the charter, and (2) whether Ordinance 91-10, the Gordis Preston Line, is unconstitutional as applied to the property of PONCE LIGHTHOUSE.

The provisions of Fla. Stat. s.86.011 (2002) state that the circuit court has jurisdiction to declare rights, status, and other legal or equitable relations. Furthermore, Fla. Stat. s.86.021 provides that any person having doubt about his or her rights in regard to a statute or municipal ordinance may secure a declaration of rights or status thereunder. However, parties, such as landowners, challenging the validity of an ordinance as applied specifically to their property must exhaust their administrative remedies before resorting to the courts. *Central Florida Investments, Inc. v. Orange County Code Enforcement Board*, 790 So.2d 593 (Fla. 5th DCA 2001). See, *e.g.*, *City of Gainesville v. Republic Investment Corp.*, 480 So.2d 1344 (Fla. 1st DCA 1986) (Held: improper for court to enter declaratory judgment where city had not reviewed and acted upon the final site plans); *City of DeLand v. Lowe*, 544 So.2d 1165 (Fla. 5th DCA 1989), *rev. denied*, 551 So.2d 461 (Held: Plaintiff failed to exhaust administrative remedies prior to filing suit in circuit court, and it was error to refuse to dismiss the premature suit).

In order to challenge a city ordinance as being unconstitutional, Fla. Stat. s.86.091 (2002) requires that the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard. In the instant matter, PONCE LIGHTHOUSE has filed a return of service of counterclaim summons upon the "agency clerk" for the Honorable Bob Butterworth, Attorney General. However, the court finds that no service has been effected upon the Attorney General of subsequent pleadings or of the hearing notice for the very Declaratory Judgment hearing held on January 17, 2003.

There being inadequate notice of these proceedings to the Attorney General, and, furthermore, there being no proof of PONCE LIGHTHOUSE having exhausted its administrative remedies, the Counter-Petition for Declaratory Judgment as to the constitutionality of ordinance 91-10 is hereby **DENIED**, and Count II of the Second Counterclaim for Declaratory Judgment (challenge to the Gordis Preston Line) is **DISMISSED, without prejudice**.

The TOWN charter must be interpreted and applied in much the same way as the state or federal constitution. See, *Luers v. Kuykendall*, 185 So. 448 (Fla. 1938). "The legislative municipal charter is to the municipality to all intents and purposes what the State Constitution is to the state." Id., at 451. In essence, unless the charter directly conflicts with state or federal law, it will be upheld. See, Fla. Stat. s.166.021(3) (2002). An act by the town council performed in contravention to the charter is *ultra vires* and wholly void. See, *A.O. Edwards v. Town of Lantana*, 77 So.2d 245 (Fla. 1955).

Here, the electorate of the TOWN, at a duly called referendum, amended the charter to add a specific height limitation to all building within the town. See, Fla. Stat. s.166.031 (2002). The very ordinance calling for the amendment recited rational, good and sufficient reasons for such a limitation. The parties have not argued that such a limitation conflicts with any provision of state or federal law, and the court finds no such conflict. The height limitation controlled all building within the town upon its adoption. Therefore, the TOWN council's subsequent adoption of ordinance 84-11 on May 9, 1984 and ordinance 86-12 on July 14, 1986, to the extent such ordinances contradicted the height limitation, was *ultra vires*. Nothing in the charter amendment permitted such a modification to the amendment as adopted by the electorate. Every act of a municipality, through its ordinances, must be within the powers expressly or impliedly conferred and must not conflict with any provision of law. See, *Hardee v. Brown*, 47 So. 834 (Fla. 1908). Furthermore, adoption of a Fourth Amendment to Development Agreement on May 21, 2001 also was *ultra vires* and of no force and effect. It, too, violated the specific height limitation set forth in the TOWN charter. PONCE LIGHTHOUSE's argument that it possessed a "vested interest" in building to a height of seven stories cannot stand. The citizens of Ponce Inlet have the power to change their charter to incorporate a height limitation. Even had a building permit been issued, such a permit does not create a vested right in PONCE LIGHTHOUSE. See, *City of Boynton Beach v. Carroll*, 272 So.2d 171 (Fla. 4th DCA 1973), *cert. den.* 279 So.2d 871; and *Florida Land Co. v. City of Winter Springs*, 427 So.2d 170 (Fla. 1983) (discussing the referendum power set forth in the Florida Constitution). Furthermore, although the claim of estoppel raised by PONCE

LIGHTHOUSE may be appealing from a moral standpoint, it cannot survive where the charter provided no authority to the council to act in the manner it did. *Edwards, supra*, at 246.

By reason of the foregoing facts, and considering the applicable law, it is thereupon **Adjudged and Decreed** as follows:

1. All ordinances or contractual undertakings adopted by the TOWN OF PONCE INLET council in violation of the thirty-five foot height limitation after the charter amendment of November 29, 1983, were *ultra vires* and void, to the extent they conflicted with the height limitation.

2. The Petitioner, TOWN OF PONCE INLET, through its council, properly enacted Ordinance 2001-08 on or about April 18, 2001. This ordinance repealed Ordinance 84-11 in its entirety and amended the Land Use and Development Code to eliminate all exceptions to the thirty-five foot height limitation.

3. The Petitioner, TOWN OF PONCE INLET, through its council, properly adopted a resolution and a Fifth Amendment to the Development Agreement on February 27, 2002, thereby re-establishing the thirty-five foot height limitation to the Beach Club property.

DONE AND ORDERED in chambers at Daytona Beach, Florida this 17th day of March, 2003.

/s/ _____
J. DAVID WALSH
Circuit Court Judge

Copies to: Peter B. Heebner, Esquire
Theodore R. Doran, Esquire
Michael Dyer, Esquire
Michael J. Roper, Esquire
Ernest H. Kohlmyer, III, Esquire
Mathew D. Staver, Esquire

APPENDIX B

IN THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

THE TOWN OF PONCE INLET, FLORIDA, a municipal corporation of the State of Florida

Petitioner,

vs.

CASE No. 2002-30561 CICI (32)

PONCE LIGHTHOUSE PROPERTIES, INC., a Florida corporation, et al.,

Respondents, /

SUBSTITUTED ORDER ON PETITIONS FOR DECLARATORY JUDGMENT

Upon consideration of motions for rehearing and responses thereto, including arguments held on this date, the Order on Petitions for Declaratory Relief entered March 17, 2003 is Withdrawn and the following is substituted therefor.

THIS CAUSE came on before the court on January 17, 2003, to consider the following matters: Petition for Declaratory Relief filed by the Petitioner, TOWN OF PONCE INLET, on March 7, 2002, joined in by Respondents, TOWERS VII CONDOMINIUM ASSOCIATION, INC., MICHAEL DiFRANCO, ELIZABETH DiFRANCO, DAVID JACOBS and ANN JACOBS, by Answer filed May 6, 2002; and Respondent, PONCE LIGHTHOUSE PROPERTIES, INC., Counter-petition for Declaratory

Relief and Injunctive Relief filed April 10, 2002. Counsel for the parties having been present and heard, and the court having read the supporting memoranda and authorities cited and being duly advised in the premises, finds as follows:

The parties have stipulated to the majority of the material facts in this case. The court also has considered the numerous exhibits admitted by the parties for the purpose of confirming and supplementing the admitted facts as necessary. These material facts are set out below.

FACTS AS TO THE HEIGHT RESTRICTION

1. The Petitioner, TOWN OF PONCE INLET, (hereinafter "TOWN") was formed in 1963 under a model charter which did not address planning or zoning issues. Rather, the charter at Article X, deferred all planning decisions to the Town Council and all zoning decisions to the South Peninsula Zoning Board. The Zoning Board enacted Resolution 74-14 to serve as zoning regulations for the TOWN. The Zoning Board later enacted Resolution 74-22 to zone certain property owned by the Teachers Retirement System of Georgia as a Planned Unit Development ("P.U.D".)

2. Respondent, PONCE LIGHTHOUSE PROPERTIES, INC., (hereinafter "PONCE LIGHTHOUSE") is the current record owner of a parcel of realty, approximately 178 acres in size, which was zoned by P.U.D. by Resolution 74-22. The sub-parcel at issue herein is described as the "Beach Club" consisting of approximately three hundred feet of oceanfront property within the TOWN.

3. On or about October 13, 1976, the TOWN council passed Resolution 76-18 amending Resolution 74-22 to limit the height of residential buildings to seven stories. It also adopted previous actions of the South Peninsula Zoning Board.

4. On or about September 14, 1977, the TOWN adopted Ordinance 77-10. This ordinance created zoning regulations within the town. It also set forth building height limitations for P.U.D.'s at seventy feet and no more than seven stories north of Inlet Harbor Road and no more than thirty-five feet south of Inlet Harbor Road.

5. On or about August 24, 1983, the TOWN Council passed Ordinance 83-012. This ordinance placed a proposed amendment to the Charter before the electors of the TOWN at a referendum to be held in November 1983. The proposed amendment is quoted as follows: "(a) Shall the Charter of the town of Ponce Inlet, Florida, be amended to limit all buildings in the Town to a maximum height of thirty-five (35') feet?" The ordinance recited several reasons supporting the restriction one of which was that "a proliferation of buildings exceeding thirty-five (35') in height will negatively impact the quality of life within the Town of Ponce Inlet." The proposed amendment was approved by a majority of the electors at the referendum held November 8, 1983. It became effective on November 29, 1983 upon filing with the Florida Secretary of State. The subject charter amendment was incorporated into the revised charter of the Town of Ponce Inlet effective January 16, 1984. Town Charter Article VII (Zoning), at Section 7.02 (Height limitation), reads as follows:

> Building within the Town of Ponce Inlet shall be limited to a maximum height of thirty-five (35) feet.

The charter amendment contained no exemptions, exclusions or other language limiting that height restriction.

6. On May 9, 1984, the TOWN council adopted Ordinance 84-11. The ordinance created an exception to the charter amendment of November 8, 1983 stating that the thirty-five foot height limitation would not apply to property zoned "T-1" as of November 8, 1983 nor to properties developed with buildings or buildings under construction with an existing or planned height greater than thirty-five feet but not more than seventy feet. The council stated in the ordinance that it was the "interpretation of the Town Council that the charter amendment adopted by the electors does not require that the property presently zoned to permit buildings of a height in excess of thirty-five (35') feet shall be restricted in the future to prohibit buildings of a height no greater than thirty-five (35') feet. . . ." It states:

> (c) Properties zoned Planned Unit Development (P.U.D.) may be developed under the terms and provisions of applicable P.U.D. agreements between the Town and property owner, or developer of property classified P.U.D. as of November 8, 1983.

7. On or about November 20, 1985, the TOWN approved Ordinance 85-27 which established new zoning regulations for the Town. It repealed Ordinance 77-10 and incorporated any orders or resolutions pertaining to P.U.D.'s and Ordinances 84-10 and 84-11. Section 700.09 entitled "T-1, Tourist Accommodations," under the subsection "Maximum Building Height," states "35 feet, except that the maximum building height shall be 70 feet in all districts that existed prior to the effective date of Ordinance 84-11 implementing the referendum of November 8,

1983 that restricted building height to 35 feet. The provisions of Ordinance 84-11 shall not be affected and shall remain in full force and effect."

8. On or about July 14, 1986, the TOWN council adopted Ordinance 86-12. It approved the Development Agreement with PONCE LIGHTHOUSE's predecessors in title. It was signed by the mayor, all members of the Town council and the developer. Paragraph one, states the following:

> However, it is understood by all the parties hereto that the Developer retains vested rights to the P.U.D. zoning and all of the prior terms and conditions of that zoning, except as amended by this Agreement, and that by entering into this Agreement, there is no waiver of any prior terms and conditions or vested rights in the zoning and terms and conditions attached thereto.

Paragraph six states the following:

> It is understood and agreed by the parties hereto that the amendments to the Town's Charter restricting the height of buildings constructed within the municipal limits to thirty-five feet (35') do not apply to the P.U.D. To the extent that there is a specific conflict between this Agreement and existing Town Resolutions and regulations, this Agreement shall control. The Developer agrees to be bound by all other applicable provisions of the Town's Zoning Ordinance not in conflict with this Development Agreement and other applicable Ordinances, including the Subdivision Ordinance and the Stormwater and Conservation Ordinance in force as of the date of the execution of this Agreement, or future amendments of said Ordinances where not inconsistent

> with this Agreement. This Agreement may be amended by mutual agreement of the parties, their heirs, successors, or assigns.

Paragraph twenty states the following:

> Unless otherwise specified in this Agreement, the ocean-front section of the P.U.D. . . . will be developed in accordance with the requirements set forth in the Zoning Ordinance of the Town of Ponce Inlet (Ordinance No.85-27) in category "T-1", Tourist Accommodation, in force at the time of this Agreement. The maximum building widths will be two hundred fifty feet (250'). The minimum separation between buildings will be fifty-five feet (55'). However, building separation will be maximized whenever possible. The building height shall be the minimum required to allow construction of buildings having the first floor parking, plus seven (7) stories of apartments, with nine foot (9') ceilings, a rust roof and standing elevator equipment facilities. The actual building height will not exceed eighty-five feet (85') from the existing ground level.

The Development Agreement was modified and recorded in the public records of Volusia County in December 1993 (the First Amendment); March 1996 (the Second Amendment); and November 1996 (the Third Amendment). The Third Amendment states the following regarding the Beach Club property:

> The maximum building height for the beach club will be thirty-five (35) feet. . . .

9. The TOWN issued building permits to developers other than PONCE LIGHTHOUSE that allowed construction of seven-story condominium buildings on the following

dates: June 15, 1988; December 29, 1988; August 2, 1990; March 19, 1992; December 31, 1992; February 25, 1994; December 4, 1995; June 17, 1997; January 14, 1998; December 17, 1998; August 26, 1999, and May 21, 2002. The TOWN issued building permits to build a cellular telephone tower to a height in excess of thirty-five feet on August 23, 2000. The TOWN issued building permits for five-story condominium buildings on August 20, 2000, October 24, 2000, January 3, 2001, April 17, 2001, May 17, 2001, and July 13, 2001. The TOWN issued building permits for four-story condominium buildings on June 13, 2001.

10. The TOWN amended and re-adopted its charter in 1990. This charter sets forth the same building height limitation of thirty-five feet with no exemptions or exceptions.

11. The TOWN council adopted Ordinance 2001-08 on or about April 18, 2001. This ordinance repealed Ordinance 84-11 in its entirety and amended the Land Use and Development Code to eliminate all exceptions to the thirty-five foot height restriction.

12. On May 21, 2001, a Fourth Amendment to the Development Agreement was executed by the parties. It stated that of the seven hundred feet of ocean frontage, four hundred feet could be developed with buildings up to seventy feet high and three hundred feet would be developed with buildings not in excess of thirty-five feet. This fourth amendment included four additional lots (having ocean frontage of 100 feet each) north of the "Beach Club." PONCE LIGHTHOUSE represented to the TOWN in its application for "Future Land Use Map Change, P.U.D. Amendment and Overall Development Plan" dated February

14, 2001 that the four additional lots (two of which were owned by Messrs DiFranco and Bochese) " . . . have either [been] purchased or are under contract to be purchased by Ponce Lighthouse Properties, Inc." The definition of "Planned Unit Development" in the Town's Land Use and Development code is "A tract of land under unified ownership. . . ." Section 5.5.12(I) of the TOWN's Land Development Code provides that, at the time of applications related to a P.U.D., the applicant or contract seller must have unified ownership over the entire area within the P.U.D., and that unified ownership shall thereafter be maintained until after the recording of the overall development plan or final plat. Amendments to the development agreements are subject to final approval by the TOWN council.

13. Of the fourth additional beachfront lots included within the Fourth Amendment to Development Agreement, two (the DiFranco and Bochese lots) were not owned by the Developer, PONCE LIGHTHOUSE, at the time of application for amendment to the P.U.D. nor are they owned by the Developer to date. On or about December 31, 2001, Mr. DiFranco corresponded with the TOWN requesting that his property be removed from the P.U.D.

14. On or about December 1, 2001, an amended charter for the TOWN took effect. It states "Building within the Town of Ponce Inlet shall be limited to a maximum height of thirty-five (35) feet."

15. On February 27, 2002, the TOWN council adopted a resolution and a Fifth Amendment to the Development Agreement. The Fifth Amendment rescinded the Fourth Amendment which had been executed by the parties on May 21, 2001. Among the council's stated

reasons adopting the Fifth Amendment rescinding the Fourth Amendment was the following: PONCE LIGHTHOUSE's false representation that it owned or maintained contracts to purchase the DiFranco and Bochese properties. This violated the provisions of the requirement for unified ownership set forth in the Land Development Code. At the time of the effective date of the rescission, PONCE LIGHTHOUSE did not possess a contract to purchase the DiFranco property.

16. The Fifth Amendment to the Development Agreement was executed by the TOWN and PONCE LIGHTHOUSE on March 7, 2002. It rescinds the Fourth Amendment. It removed the four beachfront parcels from the P.U.D. and restored the status of the provisions relating to the Beach Club parcel as provided in the Third Amendment dated November 25, 1996. That Third Amendment set forth the following provisions relating to the Beach club property at issue herein:

> The maximum building height for the beach club will be thirty-five (35) feet. The building set back from the south property line shall be twenty-five (25) feet. The residential lot shall have a maximum building height of twenty-five (25) feet and side lot set back of ten (10) feet on the north property line and ten (10) feet on the south property line.

FACTS AS TO THE GORDIS PRESTON LINE

1. Ordinance 85-27 adopted on or about November 20, 1985, at section 700.13, established a twenty-five foot setback from any P.U.D. perimeter such that the Atlantic Ocean bulkhead is considered part of such perimeter.

2. On or about June 19, 1991, the TOWN approved Ordinance 91-10 amending Ordinance 85-27 regarding the construction setback from the Atlantic Ocean. This ordinance states in pertinent part the following:

> WHEREAS, the Town Council finds that existing principal structures located on oceanfront property have been constructed in uniformity to each other in many cases thereby preserving riparian rights to the light, air and view of the Atlantic Ocean, and
>
> WHEREAS, the existing zoning regulations of the Town of Ponce Inlet in some situations would permit the construction of principal residences on oceanfront properties in such a manner so as to not be in uniformity with pre-existing principal structures, and
>
> WHEREAS, the Town Council finds that it is in the best interest of the Town and the citizens of the Town to establish a method for determining a setback line for the construction of principal structures so that the setback of principal structures to be constructed in the future will be uniform with pre-existing principal structures already constructed on oceanfront property.
>
> (2) Setback line shall mean "a straight line determined by a sealed land survey, connecting the seaward most portions of the closest adjacent principal structures to the north and south of the proposed construction site."
>
> (3) The applicant for a permit for construction on any property within the Town of Ponce Inlet, Florida abutting the Atlantic Ocean shall provide as a part of said application, a survey identifying the setback line and the proposed structures.

This ordinance is commonly referred to as the "Gordis-Preston Line."

3. The Land Use and Development Code incorporates the Gordis-Preston Line at section 5.6.3. The code at section 5.5.8 has always contained a minimum setback from all waterfront of twenty-five feet for all other zoning categories.

4. On June 25, 2001 PONCE LIGHTHOUSE submitted an application to the TOWN for construction of a seven-story condominium on the subject property site. The proposed principal structure would extend easterly beyond the Gordis-Preston Line as defined by the existing structures to the north and south. This would interfere with the ocean view of residents in existing structures to the north and south. the TOWN's Development Review Team conducted a review of the proposed plans and reported on July 9, 2001 that the plan must "show the principal structure conforms with the Coastal Construction Setback Line (Gordis Preston Line)." On July 11, 2001, the TOWN's representative, Mr. Ron Thommason, Notified PONCE LIGHTHOUSE that no principal structure was to extend seaward of the "Gordis-Preston" line.

5. On November 12, 2001, PONCE LIGHTHOUSE's engineer corresponded with the TOWN to request a variance from the waterfront setback requirement (the Gordis Preston line). The request recited his opinion that a "strict application of this set-back would result in an unreasonable and undue hardship." At hearing before the court, the attorney for PONCE LIGHTHOUSE advised that moving the principal structure westerly (to conform with the Gordon Preston Line) would cause the planned parking area to conflict with the right-of-way of South

Atlantic Avenue. PONCE LIGHTHOUSE believes this would be unreasonable and create undue hardship upon it.

6. There is no allegation in the counter-petition, nor has the fact been established, that the TOWN has made a final administrative determination as to the request for variance by PONCE LIGHTHOUSE.

DISCUSSION AND ORDER

The parties have submitted for argument and determination their respective motions for declaratory judgment upon (1) whether PONCE LIGHTHOUSE has the right to build a structure to a height in excess of thirty-five feet on the Beach Club property here in dispute, in apparent violation of the charter, and (2) whether Ordinance 91-10, the Gordis Preston Line, is unconstitutional as applied to the property of PONCE LIGHTHOUSE.

The provisions of Fla. Stat. s.86.011 (2002) state that the Circuit court has jurisdiction to declare rights, status, and other legal or equitable relations. Furthermore, Fla. Stat. is s.86.021 provides that any person having doubt about his or her rights in regard to a statute or municipal ordinance may secure a declaration of rights or status thereunder. However, parties, such as landowners, challenging the validity of an ordinance as applied specifically to their property must exhaust their administrative remedies before resorting to the courts. *Central Florida Investments, Inc. v. Orange County Code Enforcement Board*, 790 So.2d 593 (Fla. 5th DCA 2001). See, *e.g.*, *City of Gainesville v. Republic Investment Corp.*, 480 So.2d 1344 (Fla. 1st DCA 1986) (Held: improper for court to enter declaratory judgment where city had not reviewed and acted upon the final site plans); *City of DeLand v.*

Lowe, 544 So.2d 1165 (Fla. 5th DCA 1989), *rev. denied*, 551 So.2d 461 (Held: Plaintiff failed to exhaust administrative remedies prior to filing suit in circuit court, and it was error to refuse to dismiss the premature suit).

In order to challenge a city ordinance as being unconstitutional, Fla. Stat. s.86.091 (2002) requires that the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard. In the instant matter, PONCE LIGHTHOUSE has filed a return of service of counterclaim summons upon the "agency clerk" for the Honorable Bob Butterworth, Attorney General. However, the court finds that no service has been effected upon the Attorney General of subsequent pleadings or of the hearing notice for the very Declaratory Judgment hearing held on January 17, 2003.

There being inadequate notice of these proceedings to the Attorney General, and, furthermore, there being no proof of PONCE LIGHTHOUSE having exhausted its administrative remedies, the Counter-Petition for Declaratory Judgment as to the constitutionality of ordinance 91-10 is hereby **DENIED**, and Count II of the Second Counterclaim for Declaratory Judgment (challenge to the Gordis Preston Line) is **DISMISSED, without prejudice**.

The TOWN charter must be interpreted and applied in much the same way as the state or federal constitution. See, *Luers v. Kuykendall*, 185 So. 448 (Fla. 1938). "The legislative municipal charter is to the municipality to all intents and purposes what the State Constitution is to the state." Id., at 451. In essence, unless the charter directly conflicts with state or federal law, it will be upheld. See, Fla. Stat. s.166.021(3) (2002).

Here, the electorate of the TOWN, at a duly called referendum, amended the charter to add a specific height limitation to all building within the town. See, Fla. Stat. s.166.031 (2002). The very ordinance calling for the amendment recited rational, good and sufficient reasons for such a limitation. The parties have not argued that such a limitation conflicts with any provision of state or federal law, and the court finds no such conflict.

The Town council properly repealed Ordinance 84-11 on April 18, 2001 by the adoption of Ordinance 2001-08, thus leaving the charter height limitation of 35 feet in effect as to the Beach Club property.

The Town Council properly repealed the Fourth Amendment to the Development Agreement on February 27, 2002 and properly adopted the Fifth Amendment. This action left in effect the Third Amendment to the Development Agreement regarding the Beach Club phase, which limited construction on that phase to 35 feet. The developer accepted that Amendment. Thus, no claim of estoppel is warranted.

That being the case, the Charter prohibits Ponce Lighthouse Properties, Inc. from now building higher than 35 feet on the Beach Club property. The Fifth Amendment ratified the authority of the Developer to complete other properties, specifically The Links, to a height of 70 feet as approved under the Fourth Amendment, notwithstanding Ordinance 2001-08.

By reason of the foregoing facts, and considering the applicable law, it is thereupon **Adjudged and Decreed** as follows:

1. The Petitioner, TOWN OF PONCE INLET, through its council, properly enacted Ordinance 2001-08 on or about April 18, 2001. This ordinance repealed Ordinance 84-11 in its entirety, and amended the Land Use and Development Code to eliminate all exceptions to the thirty-five foot height limitation not otherwise authorized by Development Agreements for pre-existing PUD's.

2. Ordinance 84-11 was not ultra vires because it was validly enacted by a body with constitutional and statutory authority to do so. See Sec. 163.3201, Fla. Stat. (1983). It is unnecessary to adjudicate its validity because it stood repealed at the time of the Complaint for declaratory relief.

3. At the time of repeal of Ordinance 84-11 and the approval of the Fifth Amendment, no construction had yet begun on the properties zoned T-1 added to the PUD, and regardless of any vested rights of the PUD, no such estoppel rights attended the added property, and the Town is entitled to declaratory relief that the development proposed by the Respondent Ponce Lighthouse Properties Inc., east of Atlantic Avenue only, is subject to the 35 foot height limit.

4. This Order has no effect on any other property as to which construction is under way or complete. Existing permits, master permits or certificates of occupancy as to such construction are not subject to collateral attack where no direct challenge was timely filed.

DONE AND ORDERED in chambers at Daytona Beach, Florida this 11th day of April, 2003.

/s/ _____
J. DAVID WALSH
Circuit Court Judge

Copies to: Peter B. Heebner, Esquire
Theodore R. Doran, Esquire
Michael Dyer, Esquire
Michael J. Roper, Esquire
Ernest H. Kohlmyer, III, Esquire
Mathew D. Staver, Esquire

APPENDIX C

IN THE CIRCUIT COURT
OF THE SEVENTH
JUDICIAL CIRCUIT IN
AND FOR VOLUSIA
COUNTY, FLORIDA

CASE NO.: 2004-30574
CIC 32

ALFRED L. BOCHESE,

Plaintiff,

vs.

TOWN OF PONCE INLET,
a municipal corporation
organized under the laws of
the State of Florida,

Defendant /

COMPLAINT
TAKINGS CLAIM UNDER BERT J. HARRIS

(Filed Apr. 1, 2004)

The Plaintiff, ALFRED L. BOCHESE, by and through his undersigned counsel, sues the Defendant, THE TOWN OF PONCE INLET, for inordinately burdening his vested rights which has resulted in a partial taking.

JURISDICTIONAL BASIS OF THE CLAIMS

1 This action is brought pursuant to Chapter 70, Florida Statutes as a result of the Defendant inordinately burdening the Plaintiff's vested rights and property interests such as the value of his ownership interests and

the right to build to a 70ft building height resulting in a partial taking of his property.

2 Pursuant to Chapter 70, Florida Statutes, notice of this claim and an appraisal has been provided to the TOWN OF PONCE INLET more than six months prior to filing this complaint. All pre-suit requirements pursuant to *Fla. Stat.* 70.001 have been met. (See Attached Exhibit)

3 This is an action for damages in excess of fifteen thousand dollars ($15,000.00).

4 On or about March 3, 2004, an order was entered in the U.S. District Court, Orlando Division dismissing this claim for lack of subject matter jurisdiction.

5 The Plaintiff, ALFRED L. BOCHESE, (hereinafter "BOCHESE") at all relevant times was a resident of the TOWN OF PONCE INLET, located in Volusia County, Florida and the owner of a residential structure located at 4671 S. Atlantic Ave., Ponce Inlet, Florida, which is the property in controversy.

6 The Defendant, TOWN OF PONCE INLET, (hereinafter "the TOWN") is an incorporated municipality empowered by and deriving its authority from Section 2, Article 8 of the Florida Constitution and *Fla. Stat.* Chapter 166.

GENERAL ALLEGATIONS

7 At all relevant times BOCHESE was a retired citizen who owned and resided in a single-family residence on an ocean front lot located at 4671 S. Atlantic Ave., Ponce Inlet, Florida. BOCHESE'S property, which was zoned T1 as of January 1, 1983 through May 26, 2001.

Under the T1 zoning classification, a property owner enjoyed a grandfathered right to build to a height of 70 ft. pursuant to the TOWN'S Comprehensive Plan. This grandfathered right was also statutorily provided for in TOWN Ordinance 84-11, as required pursuant to Florida Statutes § 471 and TOWN Charter Provision § 7.01.

8 On April 17, 2001, the TOWN repealed its zoning Ordinance 84-11 in violation of its Comprehensive Plan, its Charter and Florida Statutes and imposed a building height limitation of 35ft. on all properties within the TOWN.

9 BOCHESE'S property was substantially surrounded by similarly situated properties located in the PUD zoning district, which permitted the highest intensive use compared to any other zoning classification in TOWN. The TOWN rezoned his property to PUD on May 26, 2001 when it adopted the Fourth Amended Development Agreement for the Planned Unit Development Agreement (PUD) in the TOWN.

10 In reliance of the TOWN'S act of re-zoning of his property to PUD and its subsequent representations that the more favorable and flexible PUD zoning regulations and uses would be applied to his property such as the 70ft. building height allowance, on August 3, 2001. BOCHESE entered into a $950,000 dollar contract with an adjoining property owner and developer of the PUD for the sale of his property. Moreover, in further reliance of the same, BOCHESE decided not to challenge the repeal of the repeal of Ordinance 84-11 since his property was no longer zoned T1. The aforementioned action by the TOWN in the repeal of Ordinance 84-11 was rendered moot because BOCHESE re-obtained a 70ft building height allowance

and grandfathered status. BOCHESE also purchased another building lot for the purposes of constructing another residence and expanded significant time and money in generating the building plans for the new home site. Additionally, BOCHESE entered into a contract with a builder for the construction of his new home.

11 On February 27, 2002, the TOWN adopted Resolution 2000-10, rescinding the Fourth Amended Development Agreement which effectively again rezoned BOCHESE's property placing it back into the T1 zoning classification and thereby eliminating the right to build on his property to height of 70ft. While the resolution's stated purpose was to correct a rezoning error involving a neighboring property, the resolution also intentionally, unnecessarily and without any rational justification rezoned BOCHESE'S property and impaired his valuable property interests such as the value of his ownership and other vested rights such as the right to build to 70ft.

12 The TOWN also claimed that the Fourth Amended Development Agreement was illegal since the Fourth Amended Development Agreement permitted 70ft-building heights in violation of the TOWN'S Charter provision, which prohibited building heights above 35ft. In its deliberation, the TOWN failed to acknowledge that Ordinance 83-12, the ordinance that placed the 35ft. height limitation on the ballot for the voters to consider as a charter amendment in 1983 was not properly noticed pursuant to Florida Statutes 166 and thereby was illegal.

13 Additionally, the TOWN failed to take into account that its application of the 35ft. height restriction to BOCHESE'S property also violated its own Comprehensive Plan and State law, which also rendered it illegal.

14 While the developer of the PUD and the TOWN litigated the Charter restriction of 35ft. and the validity of Ordinance 84-11, in *The Town of Ponce Inlet v. PLPL* the court never reached the issues subsequently raised by the PUD developer that asserted that the original Charter amendment in 1983 was void since it failed to comply with the notice requirements of *Fla. Stat.* 166 or that the repeal of Ordinance 84-11 violated State law and the TOWN Charter.

15 BOCHESE discovered in deposition testimony obtained in October 2003 that the aforementioned issues were never decided by the court since the PUD developer was forced to settle the litigation based on the TOWN'S threats that it would seek to demolish millions of dollars in existing construction by the developer if the developer did not settle. BOCHESE also discovered that the settlement agreement with the TOWN contained a confidentiality provision. Accordingly, BOCHESE never had an opportunity to fully and fairly litigate the 70ft building height controversy.

16 As alleged, the down zoning-spot zoning of BOCHESE'S property by the TOWN has inordinately burdened BOCHESE'S vested rights, such as the value of his ownership and the right to build to 70ft. and has impaired his lawful rights to use his property resulting in a taking of his property within the meaning of Fla. Stat. Chapter 70.

WHEREFORE, ALFRED L. BOCHESE demands damages against the Defendant, attorneys fees, costs and trial by jury.

Dated this 31 day of March, 2004.

/s/ Paul M. Meredith
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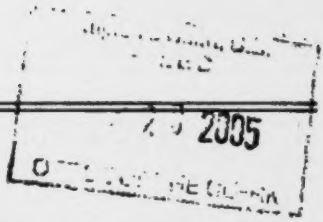

In The

Supreme Court of the United States

ALFRED L. BOCHESE,

Petitioner,

vs.

TOWN OF PONCE INLET, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Introduction

Bochese's petition presents the critical issue as to whether there are common law contract exceptions to the well-established Constitutional principle that landowners have standing to challenge zoning actions that arbitrarily and unreasonably cause the diminution in the value of their property. The Eleventh Circuit created an exception to over a century of jurisprudence providing standing when it held, *sua sponte,* that unless a person is a third-party beneficiary to development agreement between a developer and a local government, a landowner lacks standing to challenge arbitrary and unreasonable governmental action even when such governmental action would cause the diminution to the value of that landowner's property. As we have demonstrated in the petition, governmental action that involves rezoning property due to the disposition of a development agreement does not change the character of that action. Such action is still a governmental zoning action and cannot circumvent the commands of the U.S. Constitution. To hold otherwise would allow a state's common law of contracts to preempt the Constitution. As demonstrated, the Eleventh Circuit, in holding to the contrary, created a large exception to standing under *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) and Florida law and eliminated governmental responsibility of having to defend claims of arbitrary and irrational conduct that is contrary to the holding in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). In addition to creating the exception to standing, we demonstrated in the petition that the court of appeals also eliminated Rules 10(c) and 15(b) and did so by raising issues *sua sponte* in a manner that is in conflict with other

Circuits and the decisions of this Court to offend due process.

The Town's brief in opposition avoids, for the most part, discussion of the three critical substantive and procedural due process questions presented in the petition for writ of certiorari. Instead, the Town attempts to divert the Court's attention from review of these important issues by making material misstatements as to the procedural history of the case to eliminate the necessity of the court's review of the three questions presented. Petitioner respectfully asserts that if the Town is successful in this deceptive diversion, the published opinion of the Eleventh Circuit will render the Due Process clause of the Fourteenth Amendment nothing more than a distant and illusory promise, not only for Petitioner Bochese but also for any property owner rezoned pursuant to a development agreement.

It is important to note that Bochese originally filed his state takings claim under *Fla. Stat.* Chapter 70 as a supplemental claim in this case. The District Court declined to exercise supplemental jurisdiction over this claim and Bochese re-filed his state statutory claim in state circuit court. Both the federal questions and state statutory takings claim include allegations that Bochese has suffered a diminution in the value of his property based on the down zoning of his property to a zoning classification that no longer allowed a seventy-foot building height. Both the PUD and Bochese's previous T-1 zoning classification originally allowed and created a vested right of a seventy-foot building height pursuant to the Town's comprehensive plan and state law. In both cases, the thrust of Bochese's claims involve allegations that the Town engaged in arbitrary and irrational conduct by violating state law in

the elimination of the seventy-foot building height pursuant to the repeal of Ordinance 84-11. Such action by the Town violated its own comprehensive plan and policies and the procedural requirements for enacting zoning regulations under state law. Bochese raised these issues collectively in the amended complaint, in the joint pre-trial stipulation and in summary judgment proceedings. Florida law, as set forth in the petition, prohibits local governments from imposing land use restrictions inconsistent with the policy mandates of its own comprehensive plan. Bochese maintains that these allegations support his claim that he has suffered a concrete injury to entitle him to maintain an action for damages and equitable relief.

Misstatements by the Respondent

Bochese believes he has an obligation under the rules of this Court to point out to the Court the misstatements of the procedural history and law made by the Town in its brief in opposition that have a direct bearing on the issues presented in his Petition for Writ of Certiorari as to whether subject matter jurisdiction exists.

1. The Town, in its introduction, mischaracterizes the opinion of the Eleventh Circuit by claiming that the Court of Appeals recognized that the District Court properly granted summary judgment as to the merits of the case. To the contrary, the Court of Appeals reminded the District Court that it was not free to entertain the merits of the case since it had no subject matter jurisdiction. (*See* App. 14-15). The Eleventh Circuit panel held that since the District Court did not have subject matter jurisdiction it was not free to render even an advisory opinion on the merits. The District Court erroneously excluded Bochese's arguments relating to the seventy-foot height issue made

in opposition to the motion to summary judgment based on its improper invocation of the *Rooker-Feldman*[1] abstention Doctrine. Accordingly, because the District Court decided it lacked subject matter jurisdiction it could not have proceeded to decide the case on the merits and consider, in a factual vacuum, the Town's factual arguments made in its summary judgment motion and at the same time excluding Bochese's arguments because of subject matter jurisdiction.[2]

2. Most importantly, the Town also knowingly misrepresents the procedural history of the case by mischaracterizing the issues and claims that were before the Court of Appeals and the District Court. The Town asserts the opposite legal position in the state court alleging that Bochese's loss of the right to build to a seventy-foot right was litigated in the District Court. The Town argues to this Court that the Eleventh Circuit was correct in characterizing Bochese's allegations in his complaint as somewhat of a moving target. A review of the Town's affirmative

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[1] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed. 206 (1983). Established the *Rooker-Feldman* Doctrine.

[2] The Town inappropriately and prematurely attempts to argue in its brief in opposition the factual merits of Bocheses's underlying claims since the merits of the case were not previously considered. The factual issue of whether Bochese was the victim of retaliation, received adequate procedural due process by the Town, or victimized along with his developer PLPI through alleged arbitrary and capricious or extortionate conduct and by false and defamatory resolutions claiming a lack of unified ownership resulting in the diminution in the value of his property should be decided for the first time on remand in District Court. The only issue before this court is whether the appellate and the District Court erred in determining that they lacked subject matter jurisdiction based on the three questions presented in the petition for writ of certiorari.

defenses, below, filed in the state court explains why. The Town plays the shell game. It asserts here that the only claim that Bochese has made in the District Court and the Court of Appeals arise solely out of the developer's contract with the Town. *See* Response Brief, p. 13. The Town asserts to this Court that Bochese has mischaracterized his claim by attempting to articulate new claims. The Town maintains that the Eleventh Circuit was correct in excluding Bochese's claim that he had suffered a diminution in value of his property based on the down zoning and the loss of his right to build to a seventy-foot building height. The Town has been less than candid with this Court.

When, shortly before entering summary judgment, the District Court dismissed the Florida Bert J. Harris Act claim that included the loss of the seventy-foot building height, Bochese immediately re-filed in state court. (*See* App. 131). The Town files with their reply brief that complaint but not their answer. The Town's third affirmative defense alleges that Bochese is collaterally estopped and barred by the doctrines of res judicata from maintaining his claim based on the summary judgment entered by the District Court on March 23, 2004, which decided the seventy-foot building height issue.

> "Defendant affirmatively states that Plaintiff's claim under the Bert J. Harris Act is subject to dismissal because the Plaintiff's claim is barred by the doctrines of collateral estoppel and/or res judicata since the issue of the Town's height restriction governing this property was resolved by the Order on Town's Motion for Summary Judgment dated March 23, 2004 issued by Judge John Antoon in the case Alfred L. Bochese v. Town of Ponce Inlet, Florida, in the

United States District Court, Middle District of Florida, Orlando, Division Case No. 6:02-CV-01253-ORL-28-JGG." (*See* App. 133).

The Town has also served the undersigned with a safe harbor notice for sanctions under *Fla. Stat.* 57.105 together with a proposed motion for sanctions based on collateral estoppel. (*See* App. 121 and 124). The Town claims in its notice and proposed motion for sanctions that Bochese's state takings claim is frivolous on the basis that the seventy-foot issue had been decided by the District Court and by the Eleventh Circuit's affirmance from which Bochese seeks certiorari review. The doctrine of judicial estoppel should bar this type of chicanery. The Town also simply ignores the exhibits attached to the amended complaint that further make evident the issue regarding the loss of the seventy-foot building height was before the court. Attached to the First Amended Complaint as Exhibit D, the letter from the Town Attorney dated February 13, 2003 specifically acknowledged that Bochese's claim involved the repeal of Ordinance 84-11, which eliminated the seventy-foot building height use from the PUD and T-1 zoning classifications.[3] (*See* App. 128). The Town's assertion in its brief in opposition that this claim was not before the District Court can only be described as a sham.

3. The Town's assertion that there is no evidence in the record that the parties tried, by express consent, the

[3] The Town Attorney's letter also reveals that contrary to the Town's representation, the Town Council was given an additional chance to remedy its previous zoning action directed against Bochese but failed to do so. As such, Bochese had obtained a final decision and any future applications would have been an exercise in futility.

seventy-foot building height issue is also a misstatement because of the express language contained in the joint pre-trial statement. (*See* App. 121-128). The Town's assertion that it objected to this proposed amendment is also false in that it did not file a response to Bochese's motion to file a second amended complaint. Equally false is the Town's representation that the repeal of Ordinance 84-11 was not litigated by the Town in its motion for summary judgment. The Town, as a cornerstone of its motion for summary judgment, provided the District Court, as it has done in its appendix here, the order of the state circuit court holding that the Town's repeal of Ordinance 84-11 was valid since it was contrary to the Town Charter's thirty-five foot height limitation. The state court order expressly did not reach the question of whether the Town Charter provision restricting building height violated state or federal law.

Contrary to the assertions of the Town, the District Court refused to consider Bochese's claim of diminution in value based on the loss of the seventy-foot building height by invoking the *Rooker-Feldman* Doctrine, not because the magistrate denied the motion to amend. The magistrate indicated in his handwritten note on the endorsement style order denying the amendment that nothing would preclude Bochese from litigating those facts related to the loss of the seventy-foot building height under the pending claim in the operative complaint.[4] The Court of Appeals did not affirm the District Court's determination of lack of

[4] The Town's assertion that the amended complaint was not attached to the motion to amend is not only irrelevant but also untrue. Pursuant to local procedure, the proposed amended complaint is not docketed. It is only provided to the District Court for review with the motion.

subject matter jurisdiction based on *Rooker-Feldman* and instead stated that the District Court did not examine its own subject matter jurisdiction in terms of justiciability.

4. The Town argues that Bochese has raised, for the first time, that the seventy-foot issue has been tried by express consent and that it was not raised in the appellate court below during oral argument. This is true. There was no need. The panel of the Court of Appeals nor the parties ever questioned whether the claim of the loss of the seventy-foot building height was properly before the Appellate Court during oral argument. Bochese urges this court to request the Eleventh Circuit transcript of the oral argument. The transcript will reveal that the parties litigated the issue of the seventy-foot building height and that the Town admitted that Bochese had previously had the right to build to seventy feet, which was taken away because of the Town's repeal of Ordinance 84-11. The Court of Appeals subsequently determined *sua sponte* that the seventy-foot issue was not before the court since it was not contained in the amended complaint. Bochese could have easily demonstrated to the contrary if provided an opportunity. This case presents a textbook example of why due process requires uniform standards of *sua sponte* deliberation. Finally, both the text of Rule 15(b) and the decisions of this court do not require a party to file a motion in order for parties to try issues by express consent or under the procedural circumstances discussed herein to first assert such a position in the courts below.

"Rule 15(b) is intended to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel. Courts should interpret Rule 15(b) liberally and permit an amendment whenever doing so will effectuate the underlying purpose of the

rule." *Brandon v. Holt*, 469 U.S. 464, 471 (1985). In *Brandon*, this Court permitted an amendment pursuant to Rule 15(b) for the first time in the proceedings before the Supreme Court based solely on one sentence in the Petitioner's reply brief. *Id.* at 473.

The Town's assertion that it has not tried by express consent the seventy-foot issue or that an amendment pursuant to 15(b) must be first made in the courts below is not supported by the facts of this case or by the aforementioned authority.

CONCLUSION

Bochese maintains that he suffered a concrete injury as a result of the Town down-zoning his property and eliminating the seventy-foot building height use causing the diminution in the value of his property so as to confer standing under Article III of the Constitution. These claims and issues were litigated pursuant to the amended complaint, in the summary judgment proceedings and pursuant to the express stipulation set forth in the joint pre-trial stipulation and were considered by the District Court before it entered its order granting summary judgment. The procedural due process violations occasioned by the *sua sponte* expansion of the *Rooker-Feldman* Doctrine by the trial court and the erroneous *sua sponte* review of the issues by the appellate court coupled with the new rule created by the Eleventh Circuit creating a common law contract exception to *Euclid*, have prevented Bochese from demonstrating a concrete injury. The procedures adopted and the exception to standing articulated by the Eleventh

Circuit are in conflict with the opinions of this Court and are certain to be highly disruptive.

Bochese requests that this Court create a bright-line rule as to when parties are to receive notice and an opportunity to be heard on *sua sponte* deliberations. Bochese also requests that this Court reject the Eleventh Circuit's exception to standing wherein a state's common law of contracts preempts the due process clause, which historically provided standing for property owners whose property values are diminished by arbitrary and irrational zoning actions.

For the forgoing reasons and those in the petition, the petition for the writ of certiorari should be granted. In the alternative, the petition should be granted and the judgment of the Court of Appeals vacated and the case remanded for further consideration.

Respectfully submitted,

PAUL M. MEREDITH*
P.O. Box 38
St. Augustine, FL 32085
Telephone: (904) 825-1942
Facsimile: (904) 825-1912
Florida Bar No.: 0745741

**Counsel of Record* *Attorney for Petitioner*

BELL, LEEPER & ROPER, P.A.
ATTORNEYS AT LAW
2816 EAST ROBINSON STREET
ORLANDO, FLORIDA 32803-5834

[Names And Addresses Omitted In Printing]

April 20, 2005
Via Facsimile – 904-825-1912
Paul M. Meredith, Esquire
P.O. Box 38
St. Augustine, Florida 32085-0038

Re: *Bochese v. Town of Ponce Inlet, Florida*
Case No.: 2004-30574-CICI-32
Our File No.: 004-082

Dear Mr. Meredith:

We are now in receipt of your Notice of Serving Third Party Subpoena Duces Tecum and First Request for Production of Documents regarding the above-referenced matter. Please be advised that this discovery was not received until Friday, April 15, 2005, despite having a Certificate of Service date of March 29, 2005. It appears that your office inadvertently placed an incorrect zip code on the envelope causing a two week delay. Please advise as to whether you will grant the Town its entitlement to a full thirty (30) days to respond to this discovery request.

In light of receipt of these documents, I will assume that you have abandoned your Motion to Stay Proceedings and will be canceling your April 26, 2005 hearing. If you have decided to proceed with case, please be advised that the Town will assert that the April 7, 2005 published decision rendered by the Eleventh Circuit as well as Judge Walsh's decision in the previous declaratory action bars your Bert J. Harris Act claim under the collateral estoppel doctrine. This assertion has been raised in our affirmative

defenses and based on three judicial decisions finding "no injury in fact", the Town will assert that proceeding with this claim exposes you and your client to sanctions under Section 57.105 *Fla. Stat.* Therefore, you may consider this letter as the Town's notice to you, your firm, and your client that it intends on seeking reimbursement for any and all attorney's fees and costs should the Town prevail in this action. A copy of our proposed motion is attached for your review. Please also be advised that I will need to prepare a motion to add Mrs. Bochese as an indispensable party to this litigation.

Finally, I have contacted Judge Walsh's Judicial Assistant to obtain available hearing times in July to address the Town's Motion for Summary Judgment and Motion to Join an Indispensable Party. These dates are:

July 25 and 28 – All Day is open with last hearing at 3:00 p.m.

July 26 – All is open except for 10:30 a.m.

July 27 – Morning is open

July 29 – All day is open with last hearing at 2:00 p.m.

Please advise this office as soon as possible if any of the above dates are available so that we may schedule same.

In the interim, should you have any questions or concerns, please feel free to contact my office.

With regards,

/s/ Ernest Kohlmyer
Ernest H. Kohlmyer, III

EHK/lal
Enclosure
cc: Mr. Bernie Murphy, Town Manager
Theodore R. Doran, Esquire

IN THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL
CIRCUIT IN AND FOR
VOLUSIA COUNTY, FLORIDA

ALFRED L. BOCHESE, Plaintiff, vs. THE TOWN OF PONCE INLET, A municipal corporation organized under the laws of the State of Florida, Defendant.	)	CASE NO. 2004-30574-CICI-32

DEFENDANT, TOWN OF PONCE INLET, FLORIDA'S MOTION FOR SANCTIONS PURSUANT TO SECTION 57.105 FLA. STAT. AGAINST PLAINTIFFS, ALFRED AND FRANCES BOCHESE, PAUL MEREDITH, ESQUIRE AND THE MEREDITH FIRM, P.A.

COMES NOW, the Defendant, TOWN OF PONCE INLET, FLORIDA, and files this its Motion Sanctions Pursuant to Florida Statute 57.105 and in support thereof states as follows:

1. Florida Statutes Section 57.105 provides that the Court upon Motion of the party, shall award reasonable attorney's fees to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim in which the court finds that the losing party or the losing party's attorney knew or should have known that the claim, when initially presented to the court, was either not supported by the material facts necessary to establish the claim, or would not be supported by the

application of existing law to those material facts. *Florida Statutes Section 57.105(1).*

2. Section 57.105 further requires that the parties seeking sanctions under this section serve the Motion on the opposing party, and provide twenty-one (21) days after service of the Motion for the opposing party to withdraw or properly correct the claim. *Florida Statutes Section 57.105(4).*

3. On April 23, 2005, counsel for Defendant served upon counsel for Plaintiff a copy of this Motion with correspondence requesting the Plaintiff to file a Dismissal with Prejudice, as Plaintiff cannot establish that the claims brought pursuant to the Florida's "*Bert J. Harris Act*", Section 70.0001 *Fla. Stat.*

4. Information provided to Plaintiff and Plaintiff's counsel prior to the filing of this lawsuit demonstrated that the claims were not supported by the necessary material facts to establish a claim for damages under Florida's "Bert J. Harris Act", and that such claims were not supported by the application of the then-existing law to the material facts. Further, said claims were brought exclusively for the purpose of harassment and should be deemed frivolous as a matter of law.

5. As Plaintiff chose to proceed on his claim against Defendant, Town of Ponce Inlet, Florida despite the binding and final decisions of this court in the following cases:

(A) Order on Declaratory Relief dated March 17, 2003 issued by Judge David Walsh in the case: *The Town of Ponce Inlet, Florida v. Ponce Lighthouse Properties. Inc., Towers VII Condominium Association, Inc., Michael DiFranco and Elizabeth*

DiFranco, his wife, David Jacobs and Ann Jacobs, his wife, in the Circuit Court. Seventh Judicial Circuit, in and for Volusia County, Florida, Case No. 2002-30561-CICI (order to be attached upon filing motion).

(B) Substituted Order on Declaratory Relief dated April 11, 2003 issued by Judge David Walsh in the case: *The Town of Ponce Inlet, Florida v. Ponce Lighthouse Properties, Inc. Towers VII Condominium Association, Inc., Michael DiFranco and Elizabeth DiFranco, his wife, David Jacobs and Ann Jacobs, his wife,* in the Circuit Court, Seventh Judicial Circuit, in and for Volusia County, Florida, Case No. 2002-30561-CICI (order to be attached upon filing motion).

(C) Order granting Town of Ponce Inlet's Motion for Summary Judgment dated March 23. 2004 rendered by Judge Antoon of the United States District Court, Middle District of Florida, Orlando Division (order to be attached upon filing motion).

(D) Reported Opinion from the United States District Court for the Eleventh Circuit dated April 7, 2005 (decision to be attached upon filing motion).

6. The decisions of these courts clearly places Plaintiff's counsel on notice that the subject claim is meritless and frivolous. Thus, Defendant is entitled to sanctions pursuant to Florida Statutes, Section 57.105.

7. Consequently, Defendant is entitled to an award of attorneys fees as a sanction against Plaintiff and Plaintiff's counsel for knowingly raising and/or maintaining an unsupported claims [sic] based on the decisions of these court.

WHEREFORE, Defendant, TOWN OF PONCE INLET, FLORIDA, respectfully requests this Honorable Court enter an Order awarding sanctions pursuant to Florida Statutes Section 57.105.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Paul M. Meredith, Esquire, P.O. Box 38, St. Augustine, Florida 32085-0038 by U.S. mail this ___ day of May, 2005

MICHAEL J. ROPER, ESQUIRE
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ERNEST H. KOHLMYER, III, ESQUIRE
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A PARTNERSHIP OF PROFESSIONAL ASSOCIATIONS
444 SEABREEZE BOULEVARD, SUITE 800
DAYTONA BEACH, FLORIDA 32116

[Names And Addresses Omitted In Printing]

February 13, 2003

To: William P. Hoak, Mayor
Frank Rogerson, Vice Mayor
Pat Andreano, Councilperson
Nancy Epps, Councilperson
Tony Goudie, Councilperson

CC: Bernie Murphy

From: Theodore R. Doran

Re: **Alfred and Frances Bochese's Claim for Compensation Pursuant to § 70.001, Fla. Stat., "Bert J. Harris, Jr. Private Property Rights Protection Act"**

As we shared with you in our previous memorandum of November 15, 2002, Mr. and Mrs. Alfred Bochese notified the town of their intent to sue it under Florida's "Bert J. Harris, Jr., Private Property Rights Protection Act" ("Act") in August of 2002. This claim should not be confused with Mr. Bochese's recently dismissed election lawsuit appeal against the Town and Ms. Andreano by the 5th District Court of Appeals, nor his recently filed federal lawsuit which the Town recently responded to by filing a Motion to Dismiss with Prejudice.

As required by the Act, the Town provided notice of the claim to owners of contiguous property and the Florida Department of Legal Affairs. The Act requires the Town to

make a written settlement offer to Mr. and Mrs. Bochese by February 21, 2003 to effectuate one or more of the following:

> 1. An adjustment of land development or permit standards of other provisions controlling the development of land;
>
> 2. Increases or modifications in the density, intensity, or use of areas of development;
>
> 3. The transfer of developmental rights;
>
> 4. Land swaps or exchanges;
>
> 5. Mitigation, including payments in lieu of onsite mitigation;
>
> 6. Location on the least sensitive portion of the property;
>
> 7. Conditioning the amount of development or use permitted;
>
> 8. A requirement that issues be addressed on a more comprehensive basis tha [sic] a single proposed use of development;
>
> 9. Issuance of the development order, a variance, special exception, or other extraordinary relief;
>
> 10. Purchase of the real property, or an interest therein, by an appropriate governmental entity;
>
> 11. *No changes to the action of the governmental entity.*
>
> *See*, § 70.001(4)(c), Fla. Stat. (emphasis added)

After consultation with Mr. Murphy, we recommend that the Town authorize me to render a written settlement offer to Mr. and Mrs. Bochese which effectuates no change

to the Town's actions as to the subject property. A vote by the Town Council will be needed at your regularly scheduled February 19, 2003 meeting. Enclosed is a copy of my proposed letter to their attorney, Paul Meredith.

Mr. and Mrs. Bochese claims that the Town "inordinately burdened" their beachfront home located at 4671 S. Atlantic Avenue by rescinding Ordinance 84-11, the Fourth Amendment to the Development Agreement between the Town and Ponce Lighthouse Properties, Inc., applying Ordinance 91-10 ("Gordis Preston Line") and restoring their property to the T-1 zoning application. They claim that these acts diminished their home's value in "excess of $400,000." However, as you know, Ordinance 84-11 was rescinded as it clearly violated the Town charter's 35-foot height restriction as passed by the voters in 1983. Further, Ponce Lighthouse Properties, Inc. never held unified ownership or control over the Bochese's home, a condition precedent for a property being zoned into the Planned Unit Development ("P.U.D.") classification. Of course, each of these arguments has been addressed in the Town's pending litigation with Ponce Lighthouse Properties, Inc.

In short, we believe that the Bochese's claim is frivolous and, at best, weak. Based on their claim, the Bochese's seek for the Town to violate its charter and land development regulations. As such, we do not recommend that any steps be taken at this time to afford the Bochese's administrative or monetary relief. Please feel free to contact me regarding this matter. Otherwise, I look forward to meeting with you at our upcoming Town Council meeting.

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO: 2004-30574-CICI

DIV. 32-WALSH

ALFRED L. BOCHESE,

Plaintiff,

vs.

TOWN OF PONCE INLET, a municipal corporation organized under the laws of the State of Florida,

Defendant.

_____/

COMPLAINT

TAKINGS CLAIM UNDER BERT J. HARRIS

(Filed April 1, 2004)

The Plaintiff, ALFRED L. BOCHESE, by and through his undersigned counsel, sues the Defendant, THE TOWN OF PONCE INLET, for inordinately burdening his vested rights which has resulted in a partial taking.

JURISDICTIONAL BASIS OF THE CLAIMS

1. This action is brought pursuant to Chapter 70, Florida Statutes as a result of the Defendant inordinately burdening the Plaintiff's vested rights and property interests such as the value of his ownership interests and the right to build to a 70ft. building height resulting in a partial taking of his property.

2. Pursuant to Chapter 70, Florida Statutes, notice of this claim and an appraisal has been provided to the TOWN OF PONCE INLET more than six months prior to filing this complaint. All pre-suit requirements pursuant to *Fla. Stat.* 70.001 have been met. (See Attached Exhibit)

* * *

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 2004-30574-CICI-32

ALFRED L. BOCHESE,

Plaintiff,

vs.

THE TOWN OF PONCE INLET, A municipal corporation organized under the laws of the State of Florida,

Defendant.

_____/

DEFENDANT, THE TOWN OF PONCE INLET'S ANSWER AND AFFIRMATIVE DEFENSES

COMES NOW, Defendant, THE TOWN OF PONCE INLET, by and through its undersigned counsel and hereby files this its Answer and Affirmative Defenses to Plaintiff's Complaint filed herein pursuant to the Florida Rules of Civil Procedure, and as for grounds therefore would state as follows:

JURISDICTIONAL BASIS OF THE CLAIMS

1. Admitted to the extent of that the jurisdictional and venue of this action is properly filed before this court, otherwise denied.

2. Admitted to the extent of that the jurisdictional and venue of this action is properly filed before this court, otherwise denied.

3. Admitted to the extent of that the jurisdictional and venue of this action is properly filed before this court, otherwise denied.

4. Admitted

* * *

Elizabeth DiFranco, his wife, David Jacobs and Ann Jacobs, his wife, in the Circuit Court, Seventh Judicial Circuit, in and for Volusia County, Florida, Case No. 2002-30561-CICI

Third Affirmative Defense

19. Defendant affirmatively states that Plaintiff's claim under the Bert J. Harris Act is subject to dismissal because the Plaintiff's claim is barred by the doctrines of collateral estoppel and/or res judicata since the issue of the Town's height restriction governing this property was resolved by the Order on Town's Motion for Summary Judgment dated March 23, 2004 issued by Judge John Antoon in the case: *Alfred L. Bochese v. The Town of Ponce Inlet, Florida*, in the United States District Court, Middle District of Florida, Orlando, Division Case No. 6:02-CV-01253-ORL-28-JGG

Fourth Affirmative Defense

20. Defendant affirmatively states that Plaintiff's claim under the Bert J. Harris Act is subject to dismissal because the Plaintiff's claim is barred since Plaintiff's appraisal prepared by Barbara Samolinski was not a bona fide, valid appraisal as required under the statute.

Fifth Affirmative Defense

21. Defendant affirmatively states that Plaintiff's claim under the Bert J. Harris Act is subject to

dismissal because the Plaintiff has suffered no damages or loss in market value of this subject property.

Sixth Affirmative Defense

22. Defendant affirmatively states that Defendant is entitled to reasonable attorney's fees and costs pursuant to Section 70.001(5)(c)(2) *Fla. Stat.* and/or Section 57.105 *Fla. Stat.*

* * *